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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 31, 2006
& January 25, 2007

Decided May 1, 2007

No. 04-7203

JOHN A. BOEHNER,

APPELLEE

V.

JAMES A. MCDERMOTT,

APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 98cv00594)

Christopher Landau argued the causes for appellant. With him on the briefs was *Frank Cicero Jr.*

Theodore J. Boutrous Jr. and *Thomas H. Dupree Jr.* were on the brief for *amici curiae* Dow Jones & Company, et al. in support of appellant urging reversal.

Michael A. Carvin argued the causes for appellee. With him on the briefs was *Louis K. Fisher.*

Before: GINSBURG *Chief Judge*, and SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL, GARLAND, BROWN and GRIFFITH, *Circuit Judges*.*

Opinion for the Court filed by *Circuit Judge* RANDLOPH.

Concurring opinion filed by *Circuit Judge* GRIFFITH.

Dissenting opinion filed by *Circuit Judge* SENTELLE, in which *Circuit Judges* ROGERS, TATEL and GARLAND join and *Circuit Judge* GRIFFITH joins as to Part I.

RANDOLPH, *Circuit Judge*: Both parties to this case are members of the United States House of Representatives. John A. Boehner, the plaintiff, represents Ohio's Eighth District. James A. McDermott, the defendant, represents Washington's Seventh District. The complaint alleged that Representative McDermott violated 18 U.S.C. § 2511(1)(c) when he disclosed a tape recording of an illegally intercepted conversation in which Representative Boehner participated.

In our initial decision in this case, we held that Representative McDermott did not have a First Amendment right to disclose the tape. *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999). The Supreme Court vacated our decision and returned the case to us for further consideration in light of *Bartnicki v. Vopper*, 532 U.S. 514 (2001). *See* 532 U.S. 1050 (2001). We remanded the case to the district court. After the parties engaged in discovery, the district court granted summary judgment in favor of Representative Boehner, awarding him $10,000 in statutory damages, *see* 18 U.S.C. § 2520(c)(2), $50,000 in punitive damages, and reasonable attorney's fees and costs. A panel of this court, with one judge dissenting, affirmed on the ground that Representative McDermott had not lawfully obtained the tape recording.

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* Circuit Judge Kavanaugh did not participate in this matter.

Boehner v. McDermott, 441 F.3d 1010 (D.C. Cir. 2006). We vacated that decision and ordered the case reheard en banc. *Boehner v. McDermott*, No. 04-7203 (D.C. Cir. June 23, 2006) (order granting rehearing en banc).

I.

On remand, the record developed in discovery showed the following.

On December 21, 1996, Representative Boehner participated in a conference call with members of the Republican Party leadership, including then-Speaker of the House Newt Gingrich. At the time of the conversation Gingrich was the subject of an investigation by the House Committee on Standards of Official Conduct, commonly known as the House Ethics Committee. Representative Boehner was chairman of the House Republican Conference. The participants discussed how they might deal with an expected Ethics Committee announcement of Gingrich's agreement to accept a reprimand and to pay a fine in exchange for the Committee's promise not to hold a hearing.

Representative Boehner was in Florida when he joined the conference call. He spoke from a cellular telephone in his car. John and Alice Martin, who lived in Florida, used a police radio scanner to eavesdrop on the conversation, in violation of 18 U.S.C. § 2511(1)(a). They recorded the call and delivered the tape in a sealed envelope to the Florida office of then-Representative Karen Thurman. Staff members forwarded the envelope to Thurman's Washington office. On January 8, 1997, Thurman's chief of staff learned that the Martins would be visiting the Washington office. Both Thurman and her chief of staff sought legal advice about accepting the tape, presumably because they knew of its contents and how it had been recorded. At some point they consulted then-Representative David Bonior's chief of staff and legislative director. Stan Brand, former General Counsel to the House of Representatives, advised that the tape should not be accepted under any circumstances and that

it should be turned over to the Ethics Committee or other appropriate authorities. When the Martins arrived at Thurman's office, her chief of staff returned the tape in its unopened envelope and suggested they turn it over to the Ethics Committee.

At about 5 p.m. on January 8, 1997, in a small anteroom adjacent to the Ethics Committee hearing room, the Martins delivered the tape to Representative McDermott in a sealed 8-1/2" by 11" envelope. At the time, Representative McDermott was the ranking Democrat on the Ethics Committee. With the envelope the Martins also delivered a business card and a typed letter dated January 8, 1997, and addressed to "Committee On Standards of Official Conduct . . . Jim McDermott, Ranking Member." The letter read:

Enclosed in the envelope you will find a tape of a conversation heard December 21, 1996 at about 9:45 a.m. The call was a conference call heard over a scanner. We felt the information included were [sic] of importance to the committee. We live in the 5th. Congressional District and attempted to give the tape to Congresswoman Karen Thurman. We were advised by her to turn the tape directly over to you. We also understand that we will be granted immunity.

My husband and I work for Columbia County Schools in Columbia County Florida. We pray that committee will consider our sincerity in placing it in your hands.

We will return to our home today.

Thank you for your consideration.

John and Alice Martin

After conversing with the Martins, Representative McDermott accepted the envelope and returned to the Ethics Committee hearing room.

Later that evening, during a recess, Representative McDermott left the Ethics Committee hearing room and went to his office. There he opened the Martins'

envelope, emptied the contents, and listened to the tape. Still later, he called two reporters: Jeanne Cummings of The Atlanta Journal-Constitution, for whom he left a message, and Adam Clymer of *The New York Times*, whom he reached. Clymer went to Representative McDermott's office, listened to the tape, and made a recording of it. Cummings returned Representative McDermott's call the next day and came to his office and listened to the tape.

The contents of the tape had substantial news value. In particular, the tape revealed information bearing on whether Gingrich had violated his settlement agreement with the Ethics Committee. On January 10, 1997, *The New York Times* published a front-page article by Clymer entitled "Gingrich Is Heard Urging Tactics in Ethics Case." The article, which included lengthy excerpts of the recorded conversation, reported the circumstances leading to the disclosure of the tape:

> The call was taped by people in Florida who were unsympathetic to Mr. Gingrich and who said they heard it on a police scanner that happened to pick up the cellular telephone transmissions of one of the participants. It was given to a Democratic Congressman, who made the tape available to The New York Times. . .
>
> Mr. Gingrich, Mr. Bethune and the others discussed their tactics in a conference telephone call, a transcript of which was made available by a Democratic Congressman hostile to Mr. Gingrich who insisted that he not be identified further.
>
> The Congressman said the tape had been given to him on Wednesday by a couple who said they were from northern Florida. He quoted them as saying it had been recorded off a radio scanner, suggesting that one participant was using a cellular telephone. They said it was recorded about 9:45 A.M. on Dec. 21.

Adam Clymer, *Gingrich Is Heard Urging Tactics in Ethics Case*, N.Y. TIMES, Jan. 10, 1997, at A1, A20. *The Atlanta Journal-Constitution* ran a similar story the following day. *See* Jeanne Cummings, *Gingrich Ethics Case: Panel Trusted His Motives, Gingrich Told GOP Allies*, ATLANTA J.-CONST., Jan. 11, 1997, at 6A.

On January 13, 1997, the Martins held a press conference and identified Representative McDermott as the congressman to whom they had delivered the tape. Representative McDermott then sent copies of the tape to the offices of the Ethics Committee and resigned from the Committee. The Committee Chairman, then-Representative Nancy Johnson, forwarded the tape to the Department of Justice. The government prosecuted the Martins for violating 18 U.S.C. § 2511(1)(a), which forbids unauthorized interception of "wire, oral, or electronic communication." The Martins pled guilty and were fined $ 500.

On cross motions for summary judgment, the district court held that Representative McDermott violated 18 U.S.C. § 2511(1)(c) when he disclosed the tape to the reporters. *Boehner v. McDermott*, 332 F. Supp. 2d 149, 158 (D.D.C. 2004). Section 2511(1)(c) makes intentional disclosure of any illegally intercepted conversation a criminal offense if the person disclosing the communication knew or had "reason to know" that it was so acquired. The district court viewed the crucial issue to be whether Representative McDermott lawfully obtained the tape from the Martins. *See id.* at 163-64. The court held there was no genuine issue of material fact that the Martins' letter to Representative McDermott had been outside of the envelope containing the tape and that Representative McDermott must have read it. *Id.* at 166-67, 169. This established that Representative McDermott, when he accepted the tape, knew the Martins had illegally intercepted the conversation and illegally disclosed it to him. It followed that he did not lawfully obtain the tape. *Id.* at 165-66, 169. On appeal, a divided panel of this court agreed that Representative

McDermott obtained the tape unlawfully, but for reasons other than those the district court gave. 441 F.3d at 1016-17.

II.

This is an as-applied challenge to 18 U.S.C. § 2511(1)(c). The question therefore is whether Representative McDermott had a First Amendment right to disclose to the media this particular tape at this particular time given the circumstances of his receipt of the tape, the ongoing proceedings before the Ethics Committee, and his position as a member of the Committee. In answering this question we shall assume arguendo that Representative McDermott lawfully obtained the tape from the Martins.[1]

Whatever the *Bartnicki* majority meant by "lawfully obtain," *see* 532 U.S. at 538 (Breyer, J., joined by O'Connor, J., concurring), the decision does not stand for the proposition that anyone who has lawfully obtained truthful information of public importance has a First Amendment right to disclose that information. *Bartnicki* avoided laying down such a broad rule of law, *see* 532 U.S. at 528-29, and for good reason. *See* Rodney A. Smolla, *Information as Contraband: The First Amendment and Liability for Trafficking in Speech*, 96 NW. U. L. REV. 1099, 1126-32 (2002). There are many federal provisions that forbid individuals from disclosing information they have lawfully obtained. The validity of these provisions has long been assumed. Grand jurors, court reporters, and prosecutors, for instance, may "not disclose a matter occurring before the grand jury." FED. R. CRIM. P. 6(e)(2)(B). The Privacy Act imposes criminal penalties on government employees who disclose agency

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[1] Chief Judge Ginsburg and Judges Henderson, Randolph, and Brown believe that, for the reasons given in the second panel opinion in this case, Representative McDermott did not lawfully obtain the tape. *See* 441 F.3d at 1016.

records containing information about identifiable individuals to unauthorized persons. *See* 5 U.S.C. § 552a(i)(1). The Espionage Act punishes officials who willfully disclose sensitive national defense information to persons not entitled to receive it. *See* 18 U.S.C. § 793(d). The Intelligence Identities Protection Act prohibits the disclosure of a covert intelligence agent's identity. *See* 50 U.S.C. § 421. Employees of the Internal Revenue Service, among others, may not disclose tax return information. *See* 26 U.S.C. § 6103(a). State motor vehicle department employees may not make public information about an individual's driver's license or registration. *See* 18 U.S.C. § 2721. Employees of the Social Security Administration, as well as other government employees, may not reveal social security numbers or records. *See* 42 U.S.C. § 405(c)(2)(C)(viii)(I), (III).[2] Judicial employees may not reveal confidential information received in the course of their official duties. *See* CODE OF CONDUCT FOR JUDICIAL EMPLOYEES Canon 3D. And so forth.

In analogous contexts the Supreme Court has sustained restrictions on disclosure of information even though the information was lawfully obtained. The First Amendment did not shield a television station from liability under the common law right of publicity when it filmed a plaintiff's "human cannonball" act and broadcast the film without his permission. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 575-79 (1977). When a newspaper divulged the identity of an individual who provided information to it under a promise of

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[2] The government can also limit disclosures by persons who are not its employees without running afoul of the First Amendment. Private attorneys who reveal their clients' confidences may be punished for doing so. And those who sell or rent video tapes or DVDs ordinarily may not reveal "personally identifiable information concerning" their customers. *See* 18 U.S.C. § 2710(b).

confidentiality, the First Amendment did not provide the paper with a defense to a breach of contract claim. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 670 (1991). The First Amendment did not prevent the government from enforcing reasonable confidentiality restrictions on former employees of the CIA. *See Snepp v. United States*, 444 U.S. 507, 509-10 (1980). Parties to civil litigation did not "have a First Amendment right to disseminate, in advance of trial, information gained through the pretrial discovery process." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 22, 37 (1984).

In *United States v. Aguilar*, 515 U.S. 593 (1995), a case closely analogous to this one, the Supreme Court held that the First Amendment did not give a federal judge, who obtained information about an investigative wiretap from another judge, the right to disclose that information to the subject of the wiretap.[3] The judge challenged his conviction for violating 18 U.S.C. § 2232(c), which prohibits the improper disclosure of an investigative wiretap. In rejecting his First Amendment claim, the Court wrote that the judge was not "simply a member of the general public who happened to lawfully acquire possession of information about the wiretap; he was a Federal District Court Judge who learned of a confidential wiretap application from the judge who had authorized the interception, and who wished to preserve the integrity of the court. Government officials in sensitive confidential positions may have special duties of nondisclosure."[4] *Id.* at 605-06.

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[3] The equivalent provision is currently codified at § 2232(d).

[4] *See* CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 5C(8): "Information acquired by a judge in the judge's judicial capacity should not be used or disclosed by the judge in financial dealings or for any other purpose not related to the judge's judicial duties."

Aguilar stands for the principle that those who accept positions of trust involving a duty not to disclose information they lawfully acquire while performing their responsibilities have no First Amendment right to disclose that information. The question thus becomes whether, in the words of *Aguilar*, Representative McDermott's position on the Ethics Committee imposed a "special" duty on him not to disclose this tape in these circumstances. *Bartnicki* has little to say about that issue. The individuals who disclosed the tape in that case were private citizens who did not occupy positions of trust.

All members of the Ethics Committee, including Representative McDermott, were subject to Committee Rule 9, which stated that "Committee members and staff shall not disclose any evidence relating to an investigation to any person or organization outside the Committee unless authorized by the Committee."[5] This rule recognizes the unique role of the Ethics Committee and reflects a desire "to protect the rights of individuals accused of misconduct, preserve the integrity of the investigative process, and cultivate collegiality among Committee members," STAFF OF H. ETHICS REFORM TASK FORCE, 105TH CONG., REPORT OF THE ETHICS REFORM TASK FORCE ON H. RES. 168, at 10-11 (Comm. Print 1997). All members of the House of Representatives were also subject to Rule 23 of the House Rules, which stated that "[a] Member . . . shall adhere to the spirit and the letter of the Rules of the House and to the rules of duly constituted committees thereof."

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[5] Under House Rule 10, clause 4(e)(3) of the 105th Congress, the special proceedings dealing with Gingrich proceeded under the rules applicable to the 104th Congress. Thus, although Representative McDermott disclosed the tape during the 105th Congress, the applicable rule was that of the 104th Congress.

The House has the power to make and enforce such rules under the Rulemaking Clause of the Constitution, which states that "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member," U.S. CONST. art. I, § 5, cl. 2. There is no question that the rules themselves are reasonable and raise no First Amendment concerns. Counsel for Representative McDermott conceded that the House could, consistent with the First Amendment, punish Representative McDermott if it determined he had violated its rules by releasing the Martins' tape to the media.

If the First Amendment does not protect Representative McDermott from House disciplinary proceedings, it is hard to see why it should protect him from liability in this civil suit. Either he had a First Amendment right to disclose the tape to the media or he did not. If he had the right, neither the House nor the courts could impose sanctions on him for exercising it. If he did not have the right, he has no shield from civil liability or from discipline imposed by the House. In that event, his civil liability would rest not on his breach of some ethical duty, but on his violation of a federal statute for which he had no First Amendment defense. The situation is the same as that in *Aguilar*. There the defendant-judge was punished not for violating his ethical duty to maintain judicial secrecy, but for violating the general prohibition on disclosing investigative searches.[6]

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[6] The code of conduct applicable to federal judges is not judicially enforceable; its commentary states that "the Code is not designed or intended as a basis for civil liability or criminal prosecution." CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 1 cmt. Nevertheless, the Supreme Court in *Aguilar* essentially took notice of the applicable standard of conduct in deciding that the defendant-judge had no First Amendment

The only remaining question is whether the tape fell within Representative McDermott's duty of confidentiality under the rules of the House and the Ethics Committee. Representative McDermott claims the tape did not fall within his duty of confidentiality because, rather than "internal Committee information," it was a "recording of a conversation among persons outside the Committee received unsolicited from other persons outside the Committee." Citing *United States v. Rostenkowski*, 59 F.3d 1291 (D.C. Cir. 1995), he contends the rules are too ambiguous for the court to apply in this case. In *Rostenkowski*, we noted that "the Rulemaking Clause of Article I clearly reserves to each House of the Congress the authority to make its own rules." *Id.* at 1306. When "a court cannot be confident that its interpretation is correct, there is too great a chance that it will interpret the Rule differently than would the [House] itself." *Id.* Thus, "a sufficiently ambiguous House Rule is nonjusticiable." *Id.*

Here we can be confident that the rules covered Representative McDermott's handling of the tape. On December 8, 2006, the Ethics Committee adopted the report of the investigative subcommittee dealing with Representative McDermott's disclosure of the tape. The report emphasized "the unique charter of the Committee to conduct its work in a nonpartisan manner, and the threat posed to the integrity of the House of even the appearance of unfairness to Members under investigation or of bias or impartiality by Members of the Committee." *In re Representative James McDermott,* H.R. REP. NO. 109-732, at 17 (2006). After discussing Committee Rule 9 and House Rule 23, among other rules, the report concluded "Representative McDermott's conduct, *i.e.*, his disclosure to the news media of the contents of the tape furnished to him by the Martins, was inconsistent with

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defense to criminal liability for disclosing a wiretap. *See* 515 U.S. at 605-06.

the spirit of the applicable rules and represented a failure on his part to meet his obligations as Ranking Minority Member of the House Select Committee on Ethics." *Id.* at 16. The report said Representative McDermott should have "entrust[ed] the Committee at the outset with the information to which he alone on the Committee had access." *Id.* at 17.

We agree with and accept the Ethics Committee's interpretation of the rules as applied to this case, and thereby eliminate the concerns mentioned in *Rostenkowski*.[7] When Representative McDermott became a member of the Ethics Committee, he voluntarily accepted a duty of confidentiality that covered his receipt and handling of the Martins' illegal recording. He therefore had no First Amendment right to disclose the tape to the media.

Affirmed.

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[7] Representative McDermott makes much of the fact that the investigative subcommittee did not adopt a Statement of Alleged Violation under Committee Rule 19(f) of the Ethics Committee, but rather issued a report under Committee Rule 19(g) without recommending further disciplinary proceedings. We cannot see why this matters. The subcommittee reached conclusions adverse to Representative McDermott, finding that his disclosure of the tape not only violated the spirit of the rules but also violated "his obligations as Ranking Minority Member." *In re Representative James McDermott*, H.R. REP. No. 109-732, at 16 (2006). The Committee ratified the subcommittee's findings, adopting the report "as the Report of the full Committee." *See* COMMITTEE ON STANDARDS OF OFFICIAL CONDUCT, SUMMARY OF ACTIVITIES, H.R. REP. NO. 109-744, pt. VII (2007). The Committee necessarily believed that it had authority to act as it did, and "the rules of a particular committee are for that committee to interpret." LEWIS DESCHLER & WILLIAM HOLMES BROWN, PROCEDURE IN THE U.S. HOUSE OF REPRESENTATIVES, 97TH CONGRESS, ch. 17 § 11.1 (4th ed. 1982).

GRIFFITH, *Circuit Judge*, concurring: Although I agree that Representative McDermott's actions were not protected by the First Amendment and for that reason join Judge Randolph's opinion, I write separately to explain that I would have found the disclosure of the tape recording protected by the First Amendment under *Bartnicki v. Vopper*, 532 U.S. 514 (2001), had it not also been a violation of House Ethics Committee Rule 9, which imposed on Representative McDermott a duty not to "disclose any evidence relating to an investigation to any person or organization outside the Committee unless authorized by the Committee." Although the Court does not and need not reach the *Bartnicki* issue to resolve the matter before us, two previous panels in this case have held that the congressman's actions were not protected by the First Amendment. I believe it is worth noting that a majority of the members of the Court—those who join Part I of Judge Sentelle's dissent—would have found his actions protected by the First Amendment. Nonetheless, because Representative McDermott cannot here wield the First Amendment shield that he voluntarily relinquished as a member of the Ethics Committee, I join Judge Randolph's opinion in concluding that his disclosure of the tape recording was not protected by the First Amendment.

SENTELLE, *Circuit Judge, dissenting,* with whom *Circuit Judges* ROGERS, TATEL, and GARLAND join, and with whom Circuit Judge GRIFFITH joins as to Part I: The history of this case is by now quite long, and most of it is set out either in the majority opinion or in one of the previous iterations of the underlying events and the court decisions set forth in prior opinions of this court. *See Boehner v. McDermott,* 191 F.3d 463 (D.C. Cir. 1999) ("*Boehner D.C. Cir. I*"); *Boehner v. McDermott,* 441 F.3d 1010 (D.C. Cir. 2006) ("*Boehner D.C. Cir. II*"). Appellee brought the present action, which the district court dismissed, reasoning this application of 18 U.S.C. § 2511(1)(c) violated the First Amendment guarantee to the right of free speech. The defendant appealed. In a split decision, a panel of this court reversed the dismissal, holding that the application of section 2511(1)(c) and a parallel Florida statute "are not unconstitutional as applied in this case." *Boehner D.C. Cir. I,* 191 F.3d at 478; *see also id.* at 480 (Ginsburg, J., concurring). I disagreed with the majority's opinion then, as I do today. As I perceived the case then, and as we perceive it now, the issue is: "Where the punished publisher of information has obtained the information in question in a manner lawful in itself but from a source who has obtained it unlawfully, may the government punish the ensuing publication of that information based on the defect in a chain?" *Id.* at 484-85 (Sentelle, J., dissenting) (quoted in *Bartnicki v. Vopper,* 532 U.S. 514, 528 (2001)). We would have answered that question in the negative. Today I reach that conclusion with confidence, based on the Supreme Court's decision adjudicating the constitutionality of a similar application of this same analysis in *Bartnicki.*

At approximately the same time that our prior decision was making its way to the Supreme Court, the Court granted *certiorari* in *Bartnicki v. Vopper,* 200 F.3d 109 (3d Cir. 1999), to answer precisely the issue before us in *Boehner. See Bartnicki v. Vopper,* 530 U.S. 1260 (2000) (granting *certiorari*). In *Bartnicki,* the Third Circuit had

concluded that the application of 18 U.S.C. § 2511(1)(c) to prevent disclosure of information obtained by the disclosing person from a tape of unlawfully intercepted communications was constitutionally "invalid" because it "deterred significantly more speech than necessary to protect the privacy interests at stake." 532 U.S. at 522. The Supreme Court expressly granted *certiorari* "to resolve the conflict," between *Bartnicki* and our decision in *Boehner D.C. Cir. I. Id.* The Court affirmed the decision of the Third Circuit, *id.* at 535, and thereby resolved the conflict in favor of the Third Circuit's decision, not our decision in *Boehner.*

Thereafter, in the wake of *Bartnicki*, the Supreme Court vacated our prior decision in *Boehner D.C. Cir. I* and remanded to this court for further consideration in light of *Bartnicki.* 532 U.S. 1050 (2001). We remanded the matter to the district court. That court entered a new decision in favor of appellee. *Boehner v. McDermott*, 332 F. Supp. 2d 149 (D.D.C. 2004). McDermott then appealed. A panel of this court reheard the matter and affirmed the district court, again over my dissent. *Boehner D.C. Cir. II*, 441 F.3d 1010. We vacated the panel and set the matter for the present en banc proceeding. On the issue considered by the Supreme Court in *Bartnicki*, the position of the dissent in the prior panel opinions now commands a majority of the court so that Section I of this opinion speaks for the court. However, because of the majority decision as to the *Bartnicki* issue, the court found it necessary to reach a second issue not previously fully considered. As that issue became the rule of decision, and resulted in an affirmance of the district court, and as a majority of the court has now decided to affirm the district court on the basis of the second issue, discussed in Section II of this separate opinion, that portion of this opinion will speak only for a dissenting minority of the court.

I.

As to the issue dealt with in the prior opinions, speaking now for a majority of the court, we determine that *Bartnicki* is controlling and that the *Bartnicki* reasoning of the Supreme Court compels a conclusion that the district court incorrectly concluded that *Bartnicki* does not apply.

In *Bartnicki*, the chief negotiator for a Union Local, which was then engaged in negotiations on behalf of teachers with a local school board, used a cellular phone to call the president of the Union "and engage in a lengthy conversation about the status of the negotiations." 532 U.S. at 518. At one point in the conversation, referring to the school board's "intransigence," she said "'we're gonna have to go to their . . . homes . . . [t]o blow off their front porches . . . .'" *Id.* at 518-19. A local radio commentator, respondent in the Supreme Court, broadcast a tape of the conversation on a radio show. All parties agreed that the tape, like the tape of Boehner's conversation released by McDermott, was the result of an unlawful interception. The identity of the interceptor remained undisclosed throughout the litigation. The Union officers, like Boehner in the instant case, sued the publishers of the contents of the tape. The defendants included the broadcaster, the radio stations over which he made his broadcast, and the person who furnished the broadcaster with the tape, himself the head of a local citizens' group who testified that he had obtained the tape when it was left anonymously in his mailbox. Like Boehner in the case before us, plaintiffs relied on section 2511(1)(c) and a state statute of similar import. The district court granted summary judgment for the plaintiffs, rejecting the defendants' First Amendment defense. As noted above, the Third Circuit, in a divided opinion, disagreed, reversed the trial court, and remanded with directions to the district court to grant the summary judgment motions of the defendants on the basis of the First Amendment defense. *Bartnicki*, 200 F.3d at 129.

On *certiorari* the Supreme Court, as had the Third Circuit, ruled that the statute was content neutral and subjected the statute to review under the "intermediate scrutiny" standard. 532 U.S. at 521, 526. Applying that standard, the Supreme Court held that the statute was unconstitutional as applied.

In addressing the issue, the Supreme Court adopted my formulation:

> Where the punished publisher of information has obtained the information in question in a manner lawful in itself but from a source who has obtained it unlawfully, may the government punish the ensuing publication of that information based on the defect in a chain?

Id. at 528 (quoting *Boehner D.C. Cir. I,* 191 F.3d at 484-85) (internal quotation marks omitted) (Sentelle, J., dissenting). In analyzing the law on that subject, the Supreme Court first noted that "[a]s a general matter, 'state action to punish the publication of truthful information seldom can satisfy constitutional standards.'" *Id.* at 527 (quoting *Smith v. Daily Mail Publ'g Co.,* 443 U.S. 97, 102 (1979)). The Supreme Court then expressed its continuing belief "that the sensitivity and significance of the interests presented in clashes between [the] First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case." *Id.* at 529 (quoting *Florida Star v. B.J.F.*, 491 U.S. 524, 532-33 (1989)) (alteration in original). In applying that balance to the facts before it, the Court observed that the United States, appearing in the case to defend the constitutionality of the statute, had identified "two interests served by the statute." *Id.* The first of those interests was the removal of "an incentive for parties to intercept private conversations," and the second, to "minimiz[e] the harm to persons whose conversations have been illegally intercepted." *Id.* While the Court was willing to "assume that those interests adequately justify

the prohibition in § 2511(1)(d) against the interceptor's own use of information . . . acquired by violating § 2511(1)(a)," the Court explicitly stated that "it by no means follows that punishing disclosures of lawfully obtained information of public interest by one not involved in the initial illegality is an acceptable means of serving those ends." *Id.*

The Court easily dispensed with the first justification, opining that "[t]he normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it." *Id.* The Court concluded, however, that "it would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party." *Id.* at 529-30. It further noted that "there is no basis for assuming that imposing sanctions" on the communicating possessor of conversations illegally taped by another "will deter the unidentified scanner from continuing to engage in surreptitious interceptions." *Id.* at 531. Thus, the Court held that "the Government's first suggested justification for applying § 2511(1)(c) to an otherwise innocent disclosure of public information is plainly insufficient." *Id.* at 532.

However, the Court found the government's second justification, that is, the protection of privacy, "considerably stronger." *Id.* It noted the importance of privacy of communication and the legitimacy of the argument that "fear of public disclosure of private conversations might well have a chilling effect on private speech." *Id.* at 533. Nonetheless, the Court was convinced that the enforcement of section 2511(1)(c) on the facts before it, "implicat[ed] the core purposes of the First Amendment because it imposes sanctions on the publication of truthful information of public concern." *Id.* at 533-34. In concluding that this second interest did not have sufficient strength to warrant the limitation on publication of truthful information of public concern, the Court reiterated the classic principle that "'[t]he right of privacy does not prohibit any publication of matter which

is of public or general interest.'" *Id.* at 534 (quoting Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 214 (1890)).

In the light of the Supreme Court's resolution of the conflict between our *Boehner* decision and the Third Circuit's decision in *Bartnicki*, there is no justification for us to hold otherwise on the facts before us. There is no distinction of legal, let alone constitutional, significance between our facts and those before the Court in *Bartnicki*. As the panel majority in *Boehner D.C. Cir. II* admitted, "[t]he *Bartnicki* Court held that under the First Amendment, § 2511(1)(c) was invalid as applied to individuals who lawfully obtained a tape of such a conversation and then disclosed it." 441 F.3d at 1013. That said, appellee is unable to produce a material distinction between this case and *Bartnicki*. Granted, the panel majority stated:

> The difference between this case and *Bartnicki* is plain to see. It is the difference between someone who discovers a bag containing a diamond ring on the sidewalk and someone who accepts the same bag from a thief, knowing the ring inside to have been stolen. The former has committed no offense; the latter is guilty of receiving stolen property, even if the ring was intended only as a gift.

Id. at 1017 (footnote omitted). In fact, the difference is not plain at all. In *Bartnicki* the Supreme Court expressly stated:

> The suit at hand involves the repeated intentional disclosure of an illegally intercepted cellular telephone conversation about a public issue. The persons who made the disclosures did not participate in the interception, but they did know—or at least had reason to know—that the interception was unlawful.

532 U.S. at 517-18. The panel majority apparently made a distinction between the two cases based on an analogy

between a person who buys a diamond ring from a thief, and one who obtains a stolen diamond ring knowing it to be stolen or having at least good reason to know that it was stolen. We see no such distinction, let alone a plain one of constitutional significance. The Supreme Court underlined the lack of constitutional significance of the communicator's knowledge that the interception had been unlawfully conducted. It stated that "[w]e accept petitioners' submission that the interception was intentional, and therefore unlawful, and that, at a minimum, respondents 'had reason to know' that it was unlawful." *Id.* at 525. The panel majority, apparently attempting to shore up its distinction, stated:

> As Chief Judge Ginsburg wrote in the original appeal: "One who obtains information in an illegal transaction, with full knowledge the transaction is illegal, has not 'lawfully obtain[ed]' that information in any meaningful sense."

Boehner D.C. Cir. II, 441 F.3d at 1017 n.6 (quoting *Boehner D.C. Cir. I*, 191 F.3d at 479 (Ginsburg, J., concurring)) (alteration in original).

The Supreme Court has directly dispelled that notion both in *Bartnicki* itself and previously. The Court in *Bartnicki* expressly stated, "[respondents'] access to the information on the tapes was obtained lawfully, even though the information itself was intercepted unlawfully by someone else." 532 U.S. at 525. In support of this proposition the court cited and quoted *Florida Star*, which stated "[e]ven assuming the Constitution permitted a State to proscribe receipt of information, Florida has not taken this step." 491 U.S. at 536 (emphasis in original). Florida still has not taken that step, nor has Congress. Therefore, the otherwise-lawful receipt of unlawfully obtained information remains in itself lawful, even where the receiver knows or has reason to know that the source has obtained the information unlawfully.

Even less convincing is the *Boehner D.C. Cir. II* panel majority's assertion that the Court mentioned the anonymity of the interceptor in *Bartnicki* several times and "distinguished this case on that ground." 441 F.3d at 1015. The asserted distinguishing of this case occurred in a footnote stating as follows:

> In the *Boehner* case, as in this suit, a conversation over a car cell phone was intercepted, but in that case the defendant knew both who was responsible for intercepting the conversation and how they had done it. In the opinion of the majority [of the D.C. Circuit], the defendant acted unlawfully in accepting the tape in order to provide it to the media.

532 U.S. at 522 n.5 (quoted at 441 F.3d at 1014) (internal citations omitted). The panel majority hastened to say "[w]e do not want to read too much into the Court's 'but' in the first sentence, yet one must wonder why the Court drew this distinction if it meant to adopt the rule Representative McDermott urges on us." 441 F.3d at 1014. The referenced footnote occurs in the Court's statement of the facts of the case and is never referenced in the legal analysis. Indeed, the footnote is subscribed to a textual sentence stating "[i]n so doing, [the Third Circuit dissenter] agreed with the majority opinion in a similar case decided by the Court of Appeals for the District of Columbia, *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999)." 532 U.S. at 522. If the Supreme Court in fact thought that the "distinction" was of constitutional significance, one must wonder why it thought the different results in the two circuit cases constituted a disagreement. This wonderment must be greatly enhanced upon reading the next sentence, which states, "[w]e granted certiorari to resolve the conflict." *Id.* The Supreme Court then goes on to resolve the conflict without making any further mention of any factual difference between the cases. To paraphrase the *Boehner D.C. Cir. II* panel majority, one must wonder why the Court so easily dispensed with the distinction between

one who knows who unlawfully intercepted a conversation and one who knows or has reason to know it was unlawfully intercepted. Indeed, the Supreme Court's disposition of the case lays to rest any distinction even between the one who knows and the one who has reason to know. The Court reversed and remanded, directing entry of judgment for the defense on the constitutional theory. The record before the Court did not establish whether the defendants knew or only had reason to know of the unlawful obtaining of the conversations. If there were any such distinction in the High Court's view, the disposition would have been a vacatur and remand for the lower courts to establish upon which side of the "distinction" their case fell – that is, to determine whether the respondents knew or only had reason to know. As the Court made no such disposition, there is plainly no such distinction of constitutional magnitude.

The Supreme Court has decided the first issue of this case, that is, whether the United States (or Florida) can constitutionally bar the publication of information originally obtained by unlawful interception but otherwise lawfully received by the communicator, in the negative. We venture to say that an opposite rule would be fraught with danger. Just as Representative McDermott knew that the information had been unlawfully intercepted, so did the newspapers to whom he passed the information. Representative Boehner has suggested no distinction between the constitutionality of regulating communication of the contents of the tape by McDermott or by The Washington Post or The New York Times or any other media resource. For that matter, every reader of the information in the newspapers also learned that it had been obtained by unlawful intercept. Under the rule proposed by Representative Boehner, no one in the United States could communicate on this topic of public interest because of the defect in the chain of title. We do not believe the First Amendment permits this interdiction of public information either at the stage of the newspaper-reading public, of the newspaper-

publishing communicators, or at the stage of Representative McDermott's disclosure to the news media. Lest someone draw a distinction between the First Amendment rights of the press and the First Amendment speech rights of nonprofessional communicators, we would note that one of the communicators in *Bartnicki* was himself a news commentator, and the Supreme Court placed no reliance on that fact.

Therefore, as to the first issue, we now determine that the district court decision in favor of Boehner was incorrect as to this issue.

II.

A.

Notwithstanding the majority's view that the district court was incorrect as to the *Bartnicki* issue, the en banc court now holds that the judgment in favor of Boehner will be upheld on a ground different than that relied upon by the district court, arising from an issue not addressed in the previous majority opinions of this court. Boehner's argument, accepted as the basis of the majority's holding that the district court should be affirmed, is that McDermott's speech was not entitled to the First Amendment protection recognized in *Bartnicki* and the cases upon which it relies, but not because the First Amendment provides no protection against the imposition of liability under 18 U.S.C. § 2511(1)(c) to the receiver of information unlawfully obtained by the transferor of the information. Rather, Boehner argues, the protections of the First Amendment are not available in an action under § 2511(1)(c) to a public official whose First Amendment rights are otherwise limited by a body of rules unrelated to that statute. More specifically, Boehner advances an argument, which the majority accepts, that starts from the undisputed factual proposition that McDermott, as a member of the Ethics Committee of the United States House of Representatives, was subject to Committee Rule 9. That rule stated that "Committee members and staff

shall not disclose any evidence relating to an investigation to any person or organization outside the Committee unless authorized by the Committee." Boehner reasons, and the majority now agrees, that because McDermott's speech was otherwise limited in this fashion by the rules, he was not afforded the First Amendment protection recognized in *Bartnicki* against liability for disclosure under the wiretap statutes of the United States and Florida. I find this reasoning to be a *non sequitur*.

The majority relies on such cases as *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977), for the proposition that the Supreme Court has sustained restrictions on disclosure of information even though the information was lawfully obtained. Maj. Op. at 9. It is true that in *Zacchini* the Supreme Court recognized the right of a performer to recover for the economic loss caused by the uncompensated broadcast of his performance under the state law tort of infringement of the performer's "right of publicity." By no means, though, did the Court in *Zacchini* hold that its conclusion that the First Amendment did not protect the broadcaster against that cause of action deprived it of First Amendment protection in all circumstances and under all theories of law related to its possible broadcast of performances. Indeed, the *Zacchini* Court expressly stated

> It is evident, and there is no claim here to the contrary, that petitioner's state-law right of publicity would not serve to prevent respondent from reporting the newsworthy facts about petitioner's act.

433 U.S. at 574 (footnote omitted). As Justice Powell noted in dissent,

> The holding today is summed up in one sentence: "Wherever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments

> do not immunize the media when they broadcast a performer's entire act without his consent."

Id. at 579 (Powell, J., dissenting) (quoting *id.* at 574-75). Indeed, the *Zacchini* Court was at pains to note that "[p]etitioner does not seek to enjoin the broadcast of his performance; he simply wants to be paid for it." *Id.* at 578.

In short, *Zacchini* is not analogous to the case at bar. It would perhaps be analogous were we passing on the authority of the congressional committee to enforce its rule against McDermott in the face of a First Amendment claim, but that is not our case.

Likewise, the majority's reliance on *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), is misplaced. That case holds no more than that a person with whom a newspaper has made a contract not to publish certain information may recover damages when the defendant has breached that contract. The opinion in *Cohen*, while short and narrow, nonetheless distinguishes a contract claim from, for example, an action for libel or defamation:

> Nor is Cohen attempting to use a promissory estoppel cause of action to avoid the strict requirements for establishing a libel or defamation claim. . . . Cohen could not sue for defamation because the information disclosed [his name] was true.

Id. at 671 (internal citations and punctuation omitted). Thus, the Court expressly distinguished the Cohen facts from *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), wherein the Court had "held that the constitutional libel standards apply to a claim alleging that the publication of a parody was a state-law tort of intentional infliction of emotional distress." *Cohen*, 501 U.S. at 671.

Again, the *Cohen* Court by no means held that the recognition of one limitation on First Amendment protection of a particular communication rendered the

First Amendment inapplicable to that communication for other purposes. Just so today. It may well be that the Committee's rule constitutes a valid limitation on McDermott's speech. For reasons set forth below, that is by no means clear to me. It is clear that even if that is the case, the rule cannot deprive the speech of all First Amendment protection.

The majority further relies on *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). That case stands for nothing more than the proposition that

> where a protective order is entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment.

Id. at 37 (footnote omitted). That holding simply has no application to the case before us.

Finally, the majority places strongest reliance on *United States v. Aguilar*, 515 U.S. 593 (1995), a case it describes as "closely analogous to this one." Maj. Op. at 10. I can do little to improve on the majority's description of that case, which upheld the restriction of the disclosure of a confidential wiretap as applied to a federal district judge. Like the other cases discussed above, that holding is not on point for the issue before us. First, although it is true that the Court relied in part on the "special duties of nondisclosure" associated with Aguilar's position as a federal judge, the Court also stressed the fact that the statute at issue there did "not impose such a restriction [on disclosure] generally, but only upon those who disclose wiretap information 'in order to obstruct, impede, or prevent' the interception." *United States v. Aguilar*, 515 U.S. 593, 605 (1995) (quoting 18 U.S.C. § 2232(c) (current version at 18 U.S.C. § 2511(1)(c))), so at least one ground of the *Aguilar* decision has no application here. Second, we are not charged today with deciding the validity of the restriction placed on McDermott's speech

by the House Committee rule. If we were, then perhaps this would be an analogous case governed by *Aguilar*. The statute at issue in *Aguilar* was closely connected with the "special duty of nondisclosure" that limited the defendant's First Amendment rights. The Supreme Court concluded that a "Federal District Court Judge who learned of a confidential wiretap application from the judge who had authorized the interception, and who wished to preserve the integrity of the court," *Aguilar*, 515 U.S. at 606, had no First Amendment defense against a statute prohibiting "the disclosure of information that a wiretap has been sought or authorized," *id.* at 602. It does not follow that Representative McDermott's violation of a House Committee rule deprives him of a First Amendment defense to every other nondisclosure law, including § 2511(c)—which in this case is unrelated to whatever "special duty of nondisclosure" McDermott may have had as a member of Congress. Rather, we are charged with determining the constitutionality of applying § 2511 in circumstances directly paralleling those considered by the Supreme Court in *Bartnicki*. The Court in *Bartnicki* upheld the constitutional protection of the possessor of information originally obtained through an unlawful eavesdropping by another. *Aguilar* in no way speaks to that question.

Again, were we considering the validity of the Committee's rule as applied to McDermott's conduct, the cases relied upon by the majority would be instructive—perhaps compelling. But we are not. If the House Committee rules created a private right of action—a most dubious possibility—those cases would be instructive. But neither of those theories is before us. We are reviewing a case governed by *Bartnicki*, and *Bartnicki's* holding should prevail. Under that holding, we should reverse the decision of the district court and order this case dismissed.

B.

I note that the district court declined to apply *Aguilar* on the theory that "it is outside the realm of the courts to construe Congressional rules that present significant ambiguities." *Boehner v. McDermott*, 332 F. Supp. 2d 149, 162 (D.D.C. 2004). I fully agree. As the district court noted, *United States v. Rostenkowski*, 59 F.3d 1291 (D.C. Cir. 1995), "permits [the courts] to take limited judicial cognizance of the [Ethics Committee Rules]." *Boehner v. McDermott*, 332 F. Supp. 2d 149, 162 (D.D.C. 2004). However, as the district court further noted, *Rostenkowski* also "makes clear that it is outside the realm of the courts to construe Congressional rules that present significant ambiguities." *Id.* (citing 59 F.3d at 1312). Again, I fully agree. The *Rostenkowski* Court correctly stated, as the district court noted, that the courts "cannot presume to interpret [the rule]" of a House of Congress when that rule contains ambiguity. *See id.* We must leave for the coordinate branch of government the interpretation of its own rules. Committee Rule 9 states that "Committee members and staff shall not disclose any evidence relating to an investigation to any person or organization outside the Committee unless authorized by the Committee." *See* Maj. Op. at 11. From the face of the rule, it is hardly unambiguous that the rule forbids disclosure of information obtained by a member – such as McDermott – from private citizens such as the Martins. The tape in question had never become the possession of the Committee, although the Martins may well have intended that it do so. Nor is it by any means pellucid that the tape was "evidence related to an investigation" within the meaning of the rule at the time the Martins turned it over to McDermott. The release by McDermott was not in violation of an unambiguous rule.

Neither can I subscribe to the majority's confidence that the Ethics Committee's Report on McDermott's conduct removes all ambiguity. As the majority notes, the Committee ruled only that "his disclosure . . . was inconsistent with the spirit of the applicable rules and

represented a failure on his part to meet his obligations as Ranking Minority Member of the House Select Committee on Ethics." *See* Maj. Op. at 13. The very incorporation of the phrase "inconsistent with the *spirit of the applicable rules*" would seem to defeat a claim that the Committee had determined that the rules unambiguously applied to his conduct.

To the extent the court holds that Representative McDermott forfeited his First Amendment protection either by conducting himself inconsistently with the "spirit" of Rule 9 or by violating the terms of House Rule 23—which states that "[a] Member . . . shall adhere to the spirit and the letter of the Rules of the House and to the rules of duly constituted committees thereof"—its holding suffers from a separate defect. Abrogating Representative McDermott's First Amendment protections because he violated the "spirit" of a rule contravenes the well-established principle that vague restrictions on speech are impermissible because of their chilling effect, *see Reno v. ACLU*, 521 U.S. 844, 871-72 (1997), and because of "the need to eliminate the impermissible risk of discriminatory enforcement," *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1051 (1991). Plainly, subjecting a Member of Congress to liability for violating the "spirit" of a rule burdens political speech in the vaguest of ways, leaving the Member to "guess at [the] contours" of the prohibition. *Id.* at 1048. Nothing in *Aguilar* countenances such a result.

For the reasons set forth above, I respectfully dissent.

United States
Court of Appeals
for District of
Columbia Circuit
Filed
Dec. 5, 2006

CLERK

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-7203

SEPTEMBER TERM, 2006

98cv00594

JOHN A. BOEHNER,

APPELLEE

V.

JAMES A. MCDERMOTT,

APPELLANT

BEFORE: Ginsburg, Chief Judge, and Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh*, Circuit Judges

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ORDER

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* Circuit Judge Kavanaugh did not participate in this matter.

It is ORDERED, on the court's own motion, that oral argument before the en banc court will be heard at 9:30 a.m. on Thursday, January 25, 2007. It is

FURTHER ORDERED that the parties submit thirty (30) copies each of supplemental briefs in accordance with the following briefing format and schedule:

Brief for Appellant (not to exceed 15 pages)	December 22, 2006
Brief for Appellee (not to exceed 15 pages)	January 8, 2007
Reply Brief for Appellant (not to exceed 7 pages)	January 16, 2007

The briefs are to be limited to the issue whether *United States v. Aguilar*, 515 U.S. 593 (1995), limits First Amendment protection of McDermott's disclosure.

Because the briefing is keyed to the date of argument, the court will grant requests for extension of time limits only for extraordinarily compelling reasons. The parties are directed to serve and file their submissions by hand.

All briefs and appendices must contain the date that the case is scheduled for oral argument at the top of the cover. *See* D.C. Cir. Rule 28(a)(7).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Nancy G. Dunn
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-7203

SEPTEMBER TERM, 2005

Filed On: June 23, 2006

98cv00594

JOHN A. BOEHNER,

APPELLEE

V.

JAMES A. MCDERMOTT,

APPELLANT

BEFORE: Ginsburg, Chief Judge, and Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh*, Circuit Judges

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ORDER

Upon consideration of appellant's petition for rehearing en banc, the response thereto, and the vote in favor of the petition by a majority of the judges eligible to participate, it is

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* Circuit Judge Kavanaugh did not participate in this matter.

ORDERED that the petition be granted. This case will be reheard by the court sitting en banc on Thursday, September 28, 2006, at 9:30 a.m. in Courtroom #20, Sixth Floor. It is

FURTHER ORDERED that the court's judgment filed on March 28, 2006, be vacated. It is

FURTHER ORDERED that the parties resubmit an original and 25 copies each of their previously filed briefs and the joint appendix within 15 days of the date of this order.

A separate order will issue regarding allocation or oral argument time.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By:

Cheri Carter
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 15, 2005 Decided March 28, 2006

No. 04-7203

JOHN A. BOEHNER,

APPELLEE

V.

JAMES A. MCDERMOTT,

APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 98cv00594)

Frank Cicero, Jr. argued the cause for appellant. With him on the briefs was *Christopher Landau.*

Theodore J. Boutrous, Jr. and *Thomas H. Dupree, Jr.* were on the brief of *amici curiae* Dow Jones & Company, Inc., et al. in support of appellant.

Michael A. Carvin argued the cause for appellee. With him on the brief was *Louis K. Fisher.*

Before: GINSBURG, *Chief Judge*, and SENTELLE and RANDOLPH, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* RANDOLPH.

Dissenting opinion filed by *Circuit Judge* SENTELLE.

RANDOLPH, *Circuit Judge*: After the Supreme Court vacated our decision in *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999) (*Boehner I*), and returned the case to

us for further consideration in light of *Bartnicki v. Vopper*, 532 U.S. 514 (2001), *see* 532 U.S. 1050 (2001), we remanded the case to the district court; the parties engaged in discovery; and, on cross motions, the district court granted summary judgment in favor of Representative John A. Boehner, awarding him $10,000 in statutory damages, *see* 18 U.S.C. § 2520(c)(2), $50,000 in punitive damages, and reasonable attorney fees and costs. The issue on appeal is whether undisputed facts prove that Representative James A. McDermott "unlawfully" obtained the tape recording of an illegally-intercepted conversation in which Representative Boehner participated. *See Bartnicki*, 532 U.S. at 532 n.19.

Plaintiff John A. Boehner represents Ohio's Eighth District; defendant James A. McDermott represents Washington's Seventh District. The complaint alleged that Representative McDermott violated 18 U.S.C. § 2511(1)(c) when he disclosed an illegally-intercepted conversation in which Representative Boehner participated. The record developed in discovery showed the following.

On December 21, 1996, Representative Boehner participated in a conference call with members of the Republican Party leadership, including then-Speaker of the House Newt Gingrich. At the time of the conversation Gingrich was the subject of an investigation by the House Committee on Standards of Official Conduct, commonly known as the House Ethics Committee. Representative Boehner was chairman of the House Republican Conference. The participants discussed various strategies regarding how to deal with an expected Ethics Subcommittee announcement of Gingrich's agreement to accept a reprimand and to pay a fine in exchange for the Committee's promise not to hold a hearing.

Representative Boehner was driving through Florida when he joined the conference call. He spoke from a

cellular telephone in his car. John and Alice Martin, who lived in Florida, used a police radio scanner to eavesdrop on the conversation, in violation of 18 U.S.C. § 2511(1)(a). They recorded the call and delivered a tape of the conversation in a sealed envelope to the Florida office of then-Representative Karen Thurman. The tape was forwarded to Thurman's Washington office. Thurman's chief of staff learned from her, on January 8, 1997, that the Martins would be visiting her office in Washington. Both Thurman and her chief of staff sought legal advice about accepting the tape. At some point they consulted then-Representative David Bonior's chief of staff and legislative director. Stan Brand, former General Counsel to the House of Representatives, advised that the tape should not be accepted under any circumstances and that it should be turned over to the Ethics Committee or other appropriate authorities. When the Martins arrived at Thurman's office, her chief of staff returned the tape in its unopened envelope and suggested that they turn it over to the Ethics Committee.

At about 5 p.m. on January 8, 1997, in a small anteroom adjacent to the Ethics Committee hearing room, the Martins delivered the tape to Representative McDermott in a sealed 8-1/2" by 11" envelope. At the time, Representative McDermott was the ranking Democrat on the Ethics Committee. A conversation between the Martins and Representative McDermott ensued, of which more hereafter. With the envelope the Martins also delivered a business card and a typed letter, dated January 8, 1997, and addressed to "Committee on Standards of Official Conduct . . . Jim McDermott, Ranking Member." The letter stated:

> Enclosed in the envelope you will find a tape of a conversation heard December 21, 1996 at about 9:45 a.m. The call was a conference call heard over a scanner. We felt the information included were of importance to the committee. We live in the 5th. Congressional District and attempted to give the tape to Congresswoman Karen

> Thurman. We were advised by her to turn the tape directly over to you. We also understand that we will be granted immunity.
>
> My husband and I work for Columbia County Schools in Columbia County Florida. We pray that committee will consider our sincerity in placing it in your hands.
>
> We will return to our home today.
>
> Thank you for your consideration.
>
> John and Alice Martin

Representative McDermott then returned to the Ethics Committee hearing room.

Later that evening, during a recess, Representative McDermott left the Ethics Committee hearing room and went to his office. There he opened the Martins' envelope, dumped out the contents, and listened to the tape. Still later, he called two reporters: Jeanne Cummings of the *Atlanta Journal-Constitution*, for whom he left a message, and Adam Clymer of the *New York Times*, whom he reached. Clymer went to Representative McDermott's office, listened to the tape, and made a recording of it. After Cummings returned Representative McDermott's call the next day, he invited her to his office and shared the tape with her.

On January 10, 1997, Clymer published a front-page article in the *New York Times* entitled "Gingrich Is Heard Urging Tactics in Ethics Case." The article, which included lengthy excerpts of the taped conversation, reported the circumstances leading to disclosure of the tape:

> The call was taped by people in Florida who were unsympathetic to Mr. Gingrich and who said they heard it on a police scanner that happened to pick up the cellular telephone transmission of one of the participants. It was

> given to a Democratic Congressman, who made the tape available to the New York Times. . . ..
>
> . . . .
>
> Mr. Gingrich, Mr. Bethune and the others discussed their tactics in a conference call, a transcript of which was made available by a Democratic Congressman hostile to Mr. Gingrich who insisted that he not be identified further.
>
> The Congressman said the tape had been given to him on Wednesday by a couple who said they were from northern Florida. He quoted them as saying it had been recorded off a radio scanner, suggesting that one participant was using a cellular telephone. They said it was recorded about 9:45 A.M. on Dec. 21.

Adam Clymer, *Gingrich Is Heard Urging Tactics in Ethics Case*, N.Y. TIMES, Jan. 10, 1997, at A1, A20. The *Atlanta Journal-Constitution* ran a similar story on January 11th.

On January 13, 1997, the Martins held a press conference and identified Representative McDermott as the Congressman to whom they delivered the tape. Representative McDermott then sent copies of the tape to the offices of the House Ethics Committee and resigned from the Committee. The Committee Chairman, Representative Nancy Johnson, forwarded the tape to the Justice Department. The government prosecuted the Martins for violating 18 U.S.C. § 2511(1)(a), the provision forbidding unauthorized interception of "wire, oral, or electronic communication." The Martins pled guilty and were fined $500.

On cross-motions for summary judgment the district court held that Representative McDermott violated 18 U.S.C. § 2511(1)(c) when he disclosed the tape to the reporters. *Boehner v. McDermott*, 332 F. Supp. 2d 149, 158 (D.D.C. 2004) (*Boehner II*). Section 2511(1)(c) makes intentional disclosure of any illegally-intercepted

conversation a criminal offense if the person disclosing the communication knew or had "reason to know" that it was so acquired. The *Bartnicki* Court held that under the First Amendment, § 2511(1)(c) was invalid as applied to individuals who lawfully obtained a tape of such a conversation and then disclosed it, 532 U.S. at 535;[1] the Court added that its holding did not apply to those who obtain the information unlawfully, *id.* at 532 n.19. The district court therefore viewed the crucial issue to be whether Representative McDermott lawfully obtained the tape from the Martins. *See Boehner II*, 332 F. Supp. 2d at 163-64. The court held that there was no genuine issue of material fact that the Martins' letter to Representative McDermott was on the outside of the envelope containing the tape and that he must have read it. *Id.* at 166-67, 169. This established Representative McDermott's knowledge of the Martins' illegal interception at the time he received the tape. It followed that he had not lawfully obtained the tape. *Id.* at 165-66, 169.

According to Representative McDermott, the district court misinterpreted *Bartnicki*. As he reads the Supreme Court's opinion, any individual who did not participate in the illegal interception of a conversation has a First Amendment right to disclose it.

It is true that in *Bartnicki* the defendants had no connection to the illegal interception. The tape of the conversation wound up in Yocum's mailbox, placed there

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[1] The Court also held that for the First Amendment to shield disclosure, the conversation must contain information of "public concern." 532 U.S. at 535. But *see Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), in which the Court refused to make the First Amendment turn on such a consideration in light of the "difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of 'general or public interest' and which do not . . .. We doubt the wisdom of committing this task to the conscience of judges." *Id.* at 346.

by some unknown person. 532 U.S. at 519, 525. Neither Yocum nor the radio broadcaster who played the tape on his program after Yocum gave it to him knew who had done the intercepting. The Court mentioned the anonymity of the interceptor several times, *id.* at 525, 530 & n.15, 531, 535, and distinguished this case on that ground:

> In the *Boehner* case, as in this suit, a conversation over a car cell phone was intercepted, but in that case the defendant knew both who was responsible for intercepting the conversation and how they had done it. 191 F. 3d, at 465. In the opinion of the majority, the defendant acted unlawfully in accepting the tape in order to provide it to the media. *Id.*, at 476.

532 U.S. at 522 n.5. We do not want to read too much into the Court's "but" in the first sentence, yet one must wonder why the Court drew this distinction if it meant to adopt the rule Representative McDermott urges on us. Elsewhere in the *Bartnicki* opinion the Court stressed that it had before it only an "as applied" challenge to the federal statute, *id.* at 524, 525; that in light of the facts of the case, the question presented was "narrow," *id.* at 517, 528, 529; and that it was deciding only that those who lawfully obtain information have a First Amendment right to disclose it to the public, *id.* at 525, 528 (quoting *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979), and *Florida Star v. B.J.F.*, 491 U.S. 524, 535 n.8 (1989)). The Court also stated that its "holding, of course, does not apply to punishing parties for obtaining the relevant information unlawfully." *Id.* at 532 n.19.

Representative McDermott's reading of these and other statements of the Court is quite implausible. By his logic, if he stole the tape from the Martins he would have lawfully obtained it because he did not participate in the initial illegal interception. Among other statements in the majority opinion, footnote 19 – which we have just quoted – clearly stands for the opposite

proposition. Justice Breyer, in his concurring opinion, in which Justice O'Connor joined, understood as much. Citing footnote 19, he distinguished cases in which the person who disclosed the conversation "aided or abetted . . . the later delivery of the tape by the interceptor to an intermediary, or the tape's still later delivery by the intermediary to the media." *Id.* at 538 (Breyer, J., concurring) (citing the federal aiding and abetting statute, 18 U.S.C. § 2).

The eavesdropping statute may not itself make receiving a tape of an illegally-intercepted conversation illegal. *See id.* at 525, 528; *see also* 18 U.S.C. § 2511(1). But it does not follow that anyone who receives a copy of such a conversation has obtained it legally and has a First Amendment right to disclose it. If that were the case, then the holding in *Bartnicki* is not "narrow" as the Court stressed, but very broad indeed. On the other hand, to hold that a person who knowingly receives a tape from an illegal interceptor either aids and abets the interceptor's second violation (the disclosure), or participates in an illegal transaction would be to take the Court at its word. It also helps explain why the Court thought it so significant that the illegal interceptor in *Bartnicki* was unknown, *see* 532 U.S. at 519, 522 n.5, 525, 530 & n.15, 531, and why the Court distinguished this case on that ground, *see id.* at 522 n.5.[2]

As to the evidence, the district court stated that if Representative McDermott

> read the cover letter or the Martins related its relevant contents to him at the time [he] received

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[2] The Court added that "[i]n the opinion of the majority, the defendant [Representative McDermott] acted unlawfully in accepting the tape in order to provide it to the media." 532 U.S. at 522 n.5. (The case came to us on appeal from the dismissal of a complaint; our conclusion was based on a construction of the complaint. *See Boehner I*, 191 F.3d at 464 & n.1).

> the tape, he would have possessed sufficient knowledge of the illegal transaction to have unlawfully obtained the tape . . .. On the other hand, if [Representative McDermott] learned of the contents of the letter at some later time after taking possession of the tape, . . . the case more closely resembles *Bartnicki* . . ..

Boehner II, 332 F. Supp. 2d at 165-66. The court then reached two conclusions: the Martins' cover letter was outside the envelope containing the tape and Representative McDermott read it when the Martins' handed it to him, not when he later returned to his office to listen to the tape. *Id.* at 166-67, 169. Representative McDermott objects that both of the court's conclusions rested on material facts that were genuinely in dispute and that summary judgment was therefore improper. Our de novo review of the judgment, *see, e.g., Branch Ministries v. Rossotti*, 211 F.3d 137, 141 (D.C. Cir. 2000), supports his position.

The cover letter stated: "Enclosed in the envelope you will find a tape." But this does not prove that the letter was outside the envelope containing the tape. The tape was in fact "enclosed" regardless where the Martins placed the letter.[3] And even if the letter was outside the envelope, this does not prove that Representative McDermott read it at the time he received the tape. "[C]ommon sense" may indicate, as the district court wrote, "that one who accepts from strangers a package with a short accompanying letter is likely to read the letter . . .." *Boehner II*, 332 F. Supp. 2d at 166. But at the summary judgment stage, the nonmoving party is entitled to "all justifiable inferences" from the evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *see, e.g., Matsuhita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986); *Salazar v. Wash. Metro. Area*

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[3] The Martins apparently were not deposed.

Transit Auth., 401 F.3d 504, 507 (D.C. Cir. 2005). Here Representative McDermott did not simply rest on "allegations or denials of the adverse party's pleading." FED. R. CIV. P. 56(e). As Rule 56 requires, he adduced evidence – his deposition testimony – in which he denied ever having seen the letter. A justifiable inference from that evidence is that he did not read it.[4]

While there was a genuine issue of material fact regarding Representative McDermott's knowledge of the cover letter, we nevertheless conclude that Representative Boehner was "entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); *see Teamsters Local Union No. 61 v. United Parcel Serv., Inc.*, 272 F.3d 600, 603-04 (D.C. Cir. 2001); *Samii v. Billington*, 195 F.3d 1, 3 (D.C. Cir. 1999); *Doe v. Gates*, 981 F.2d 1316, 1322 (D.C. Cir. 1993). We start with the *New York Times* article. Clymer reported that a certain Congressman, later identified as Representative McDermott, "quoted" the interceptors (the Martins) as saying that the conversation was "recorded off a radio scanner." The evidence shows that there were only two ways Representative McDermott could have known this – from the cover letter or from his conversation with the Martins in the anteroom when they handed him the tape. We may eliminate the cover letter. As we have just said, Representative McDermott denied having read it. His denials were unequivocal—they were not of the I-do-not-recall-one-way-or-the-other variety. This leaves only the oral conversation. Unlike his unequivocal denial of ever having read the cover letter, Representative McDermott

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[4] Representative McDermott also makes much of his testimony that he did not know what was on the tape when he received it. But this is not evidence tending to show his failure to read the letter when the Martins handed him the tape. Even if he read the cover letter he would not have known what the tape contained. As to the contents of the tape, the letter said only that it would be "of importance to the committee."

does not deny that the Martins told him they used a scanner to intercept the conversation. He testified only that he could "not remember one way or another." Nor does Representative McDermott deny telling Clymer, the *New York Times* reporter, that the Martins told him they recorded the conversation over a scanner. He testified only that "I wouldn't say I didn't say it. I just don't recall it." This is insufficient to draw into dispute Representative Boehner's statement of undisputed facts that Representative McDermott told Clymer "that [the Martins] had heard and recorded the conversation over a police scanner on December 21, 1996 at 9:45 a.m." *See FEC v. Toledano*, 317 F.3d 939, 949-50 (9th Cir. 2002); *FDIC v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 205 F.3d 66, 75 (2d Cir. 2000). While a court should draw all justifiable evidentiary inferences in favor of the non-moving party, there is no such inference to draw in Representative McDermott's favor. *See Lusk v. Foxmeyer Health Corp.*, 129 F.3d 773, 779-80 (5th Cir. 1997); *Crabbs v. Copperweld Tubing Prods. Co.*, 114 F.3d 85, 88 (6th Cir. 1997); *DeLuca v. Winer Indus., Inc.*, 53 F.3d 793, 798 (7th Cir. 1995).

Because there was no genuine dispute that Representative McDermott knew the Martins had illegally intercepted the conversation, he did not lawfully obtain the tape from them. The Martins violated § 2511 not once, but twice – first when they intercepted the call and second when they disclosed it to Representative McDermott. It is of little moment whether Representative McDermott's complicity constituted aiding and abetting their criminal act,[5] or the formation

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[5] *See* 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 13.2(a) (2d ed. 2003); *id.* § 13.2(b), at 344 ("Generally, it may be said that accomplice liability exists when the accomplice intentionally encourages or assists, in the sense that his purpose is to encourage or assist another in the commission of a crime as to which the accomplice has the requisite mental state."); *United States v. Walker*, 99 F.3d 439, 442 (D.C. Cir.

of a conspiracy with them, or amounted to participating in an illegal transaction.[6] The difference between this case and *Bartnicki* is plain to see.[7] It is the difference

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1996) (explaining the "shared intent" standard for aiding and abetting as an "overlap with (but not necessarily match) the criminal intent of the principal"); *see also United States v. Yakou*, 428 F.3d 241, 252 (D.C. Cir. 2005) (stating the "long . . . established [principle] that a person can be convicted of aiding and abetting another person's violation of a statute even if it would be impossible to convict the aider and abettor as a principal").

[6] As Chief Judge Ginsburg wrote in the original appeal: "One who obtains information in an illegal transaction, with full knowledge the transaction is illegal, has not 'lawfully obtain[ed]'that information in any meaningful sense." *Boehner I*, 191 F.3d at 479 (Ginsburg, J., concurring) (alteration in original).

[7] Our dissenting colleague believes that the Supreme Court's resolution of the conflict between *Boehner I* and *Bartnicki v. Vopper*, 200 F.3d 109 (3d Cir. 1999), in favor of the Third Circuit's decision implicitly means that Representative McDermott had a First Amendment right to disclose the tape. Dissenting Op. at 2; *see also id.* at 5. If the Court had agreed with our colleague, it would have reversed our decision; instead, it vacated and remanded for reconsideration. Furthermore, one must pay close attention to the nature of the conflict between *Boehner I* and the Third Circuit's decision. We held that the statute was content neutral and that it was constitutional as applied, because it survived intermediate scrutiny. *Boehner I*, 191 F.3d at 467-70. The Third Circuit held that the statute was content neutral but did not survive intermediate scrutiny as applied. *Bartnicki*, 200 F.3d at 123-29. In resolving that conflict the Court held only that someone who lawfully obtains an illegally-intercepted conversation may disclose it, which still leaves the question we face in this case: whether Representative McDermott lawfully obtained the tape from the Martins.

Our colleague also thinks it matters little that the Supreme Court distinguished *Boehner I* on the ground that McDermott

between someone who discovers a bag containing a diamond ring on the sidewalk and someone who accepts the same bag from a thief, knowing the ring inside to have been stolen. The former has committed no offense; the latter is guilty of receiving stolen property, even if the ring was intended only as a gift.[8] *See* MODEL PENAL CODE § 223.6(1) (1962); D.C. CODE § 22-3232; *see also Williams v. United States*, 281 A.2d 293, 294 (D.C. 1971) (citing *Rugendorf v. United States*, 376 U.S. 528 (1964); *Wilson v. United States*, 162 U.S. 613, 619 (1896)) (explaining a prior version of § 22-3232).

Affirmed.

SENTELLE, J, *dissenting*: In the first eight paragraphs of its opinion, the majority accurately lays out the somewhat extended history of this case. Two persons not parties to the case unlawfully intercepted communications of the appellee and gave a tape of the communications to the appellant in violation of 18 U.S.C. § 2511(1)(a) and (1)(c). Appellee brought the present action, which the district court dismissed, reasoning this application of the statute violated the First Amendment guarantee to the right of free speech.

The defendant appealed. In a split decision, a panel of this court (identical to the present panel) reversed the dismissal, holding that the application of section

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may have participated in an illegal transaction. Dissenting Op. at 7-8. It matters little, he writes, because the Court did the distinguishing in the factual portion of the opinion. *Id.* But that makes our point. As we have explained, the facts of this case are, in important respects, quite different than those in *Bartnicki*.

[8] We do not understand Representative McDermott to be arguing that even if he unlawfully obtained the illegally-intercepted conversation, he had a First Amendment right to disclose the tape. *See generally Boehner I*, 191 F.3d 463; *id.* at 479 (Ginsburg, J., concurring).

2511(1)(c) and a parallel Florida statute "are not unconstitutional as applied in this case." *Boehner v. McDermott*, 191 F.3d 463, 478 (D.C. Cir. 1999); *see also id.* at 480 (Ginsburg, J., concurring). I disagreed with the majority's opinion then, as I do today. As I perceived the case then, and as I perceive it now, the issue is: "Where the punished publisher of information has obtained the information in question in a manner lawful in itself but from a source who has obtained it unlawfully, may the government punish the ensuing publication of that information based on the defect in a chain?" *Id.* at 484-85 (Sentelle, J., dissenting) (quoted in *Bartnicki v. Vopper*, 532 U.S. 514, 528 (2000)). I would have answered that question in the negative. While I thought the appropriate test to be a strict scrutiny applicable to content-based limitation on the exercise of free speech, *see id.* at 481 (Sentelle, J., dissenting), a proposition ultimately rejected by the Supreme Court in *Bartnicki*, I nonetheless would reach the same conclusion today under tests applicable to "content-neutral law[s] of general applicability." *Bartnicki*, 532 U.S. at 526. Moreover, I would reach such a conclusion with confidence, based on the Supreme Court's decision adjudicating the constitutionality of a similar application of this same statement in *Bartnicki*.

At approximately the same time that our prior decision was making its way to the Supreme Court, the Supreme Court granted certiorari in *Bartnicki v. Vopper*, 200 F.3d 109 (3d Cir. 1999), to answer precisely the issue before us in Boehner. *See Bartnicki v. Vopper*, 530 U.S. 1260 (2000) (granting certiorari). In *Bartnicki*, the Third Circuit had concluded that the application of 18 U.S.C. § 2511(1)(c) to prevent disclosure of information obtained by the disclosing person from a tape of unlawfully intercepted communications was constitutionally "invalid" because it "deterred significantly more speech than necessary to protect the privacy interests at stake." 532 U.S. at 522. The Supreme Court expressly granted certiorari "to resolve the conflict," between *Bartnicki* and our decision in *Boehner*. *Id.* The Supreme Court

affirmed the decision of the Third Circuit, *id.* at 535, and thereby resolved the conflict in favor of the Third Circuit's decision, not our decision in *Boehner*.

In *Bartnicki*, the chief negotiator for a Union Local, which was then engaged in negotiations on behalf of teachers with a local school board, used a cellular phone to call the president of the Union "and engage in a lengthy conversation about the status of the negotiations." *Id.* at 518. At one point in the conversation, referring to the school board's "intransigence," she said "'we're gonna have to go to their . . . homes . . . [t]o blow off their front porches . . . .'" *Id.* at 518-19. A local radio commentator, respondent in the Supreme Court, broadcast a tape of the conversation on a radio show. All parties agreed that the tape, like the tape of Boehner's conversation released by McDermott, was the result of an unlawful interception. The identity of the interceptor remained undisclosed throughout the litigation. The Union officers, like Boehner in the instant case, sued the publishers of the contents of the tape. In that case, the defendants included the broadcaster, the radio stations over which he made his broadcast, and the person who furnished the broadcaster with the tape, himself the head of a local citizens' group who testified that he had obtained the tape when it was left anonymously in his mailbox. Like Boehner in the case before us, plaintiffs relied on section 2511(1)(c) and a state statute of similar import. The district court granted summary judgment for the plaintiffs, rejecting the defendant's First Amendment defense. As noted above, the Third Circuit, in a divided opinion, disagreed, reversed the trial court, and remanded with directions to the district court to grant the summary judgment motions of the defendants on the basis of the First Amendment defense. *Bartnicki*, 200 F.3d at 129.

On *certiorari* the Supreme Court, as had the Third Circuit, ruled that the statute was content neutral and subjected the statute to review under the "intermediate scrutiny" standard. 532 U.S. at 521, 526. While that

standard is less stringent than the one I would have erroneously applied to the case before us, the result was nonetheless the one that I contended should have prevailed in *Boehner*. That is, the Supreme Court ruled that the statute was unconstitutional as applied.

In addressing the issue, the Supreme Court adopted my formulation:

> Where the punished publisher of information has obtained the information in question in a manner lawful in itself but from a source who has obtained it unlawfully, may the government punish the ensuing publication of that information based on the defect in a chain?

Id. at 528 (quoting *Boehner*, 191 F.3d at 484-85) (Sentelle, J., dissenting)). In analyzing the law on that subject, the Supreme Court first noted that "[a]s a general matter, 'state action to punish the publication of truthful information seldom can satisfy constitutional standards.'" *Id.* at 527 (quoting *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 102 (1979)). The Supreme Court then expressed its continuing belief "that the sensitivity and significance of the interests presented in clashes between [the] First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case." *Id.* at 529 (quoting *Florida Star v. B.J.F.*, 491 U.S. 524, 532-33 (1989)) (alteration in original). In applying that balance to the facts before it, the Court observed that the United States, appearing in the case to defend the constitutionality of the statute, had identified "two interests served by the statute." *Id.* The first of those interests was the removal of "an incentive for parties to intercept private conversations," and the second, to "minimiz[e] the harm to persons whose conversations have been illegally intercepted." *Id.* While the Court was willing to "assume that those interests adequately justify the prohibition in § 2511(1)(d) against the interceptor's own use of information . . . acquired by violating §

2511(1)(a)," the Court explicitly stated that "it by no means follows that punishing disclosures of lawfully obtained information of public interest by one not involved in the initial illegality is an acceptable means of serving those ends." *Id.*

The Court easily dispensed with the first justification, opining that "[t]he normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it." *Id.* The Court concluded, however, that "it would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party." *Id.* at 529-30. It further noted that "there is no basis for assuming that imposing sanctions" on the communicating possessor of conversations illegally taped by another "will deter the unidentified scanner from continuing to engage in surreptitious interceptions." *Id.* at 531. Thus, the Court held that "the Government's first suggested justification for applying § 2511(1)(c) to an otherwise innocent disclosure of public information is plainly insufficient." *Id.* at 532.

However, the Court found the government's second justification, that is, the protection of privacy, "considerably stronger." *Id.* It noted the importance of privacy of communication and the legitimacy of the argument that "fear of public disclosure of private conversations might well have a chilling effect on private speech." *Id.* at 533. Nonetheless, the Court was convinced that the enforcement of section 2511(1)(c) on the facts before it, "implicat[ed] the core purposes of the First Amendment because it imposes sanctions on the publication of truthful information of public concern." *Id.* at 533-34. In concluding that this second interest did not have sufficient strength to warrant the limitation on publication of truthful information of public concern, the Court reiterated the classic principle that "'[t]he right of privacy does not prohibit any publication of matter which is of public or general interest.'" *Id.* at 534 (quoting

SAMUEL D. WARREN & LOUIS D. BRANDEIS, *THE RIGHT TO PRIVACY*, 4 HARV. L. REV. 193, 214 (1890)).

In the light of the Supreme Court's resolution of the conflict between our *Boehner* decision and the Third Circuit's decision in its *Bartnicki* opinion, there is no justification for us to hold otherwise on the facts before us. There is no distinction of legal let alone constitutional significance between our facts and those before the Court in *Bartnicki*. As the majority admits, "[t]he *Bartnicki* Court held that under the First Amendment, § 2511(1)(c) was invalid as applied to individuals who lawfully obtained a tape of such a conversation and then disclosed it, 532 U.S. at 535." Maj. Op. at 6. That said, the majority is unable to produce a distinction between this case and *Bartnicki*. Granted, the majority states:

The difference between this case and *Bartnicki* is plain to see. It is the difference between someone who discovers a bag containing a diamond ring on the sidewalk and someone who accepts the same bag from a thief, knowing the ring inside to have been stolen. The former has committed no offense; the latter is guilty of receiving stolen property, even if the ring was intended only as a gift.

Maj. Op. at 13-14 (footnotes omitted). In fact, the difference is not plain at all. In *Bartnicki* the Supreme Court expressly stated:

> The suit at hand involves the repeated intentional disclosure of an illegally intercepted cellular telephone conversation about a public issue. The persons who made the disclosures did not participate in the interception, but they did know--or at least had reason to know--that the interception was unlawful.

532 U.S. at 517-18. The majority apparently would make the distinction between the two cases based on an analogy between a person who buys a diamond ring from a thief, and one who obtains a stolen diamond ring knowing it to be stolen or having at least good reason to

know that it was stolen. I see no such distinction, let alone a plain one of constitutional significance. The Supreme Court underlined the lack of constitutional significance of the communicator's knowledge that the interception had been unlawfully conducted. It stated that "[w]e accept petitioners' submission that the interception was intentional, and therefore unlawful, and that, at a minimum, respondents 'had reason to know' that it was unlawful." *Id.* at 525. The majority, apparently attempting to shore up its artificial distinction, states:

> As Chief Judge Ginsburg wrote in the original appeal: "One who obtains information in an illegal transaction, with full knowledge the transaction is illegal, has not 'lawfully obtain[ed]' that information in any meaningful sense."

Maj. Op. at 13 n.6 (quoting *Boehner*, 191 F.3d at 479 (Ginsburg, J., concurring)) (alteration in original).

The Supreme Court has directly dispelled that notion both in *Bartnicki* itself and previously. The Supreme Court in *Bartnicki* expressly stated, "[respondents'] access to the information on the tapes was obtained lawfully, even though the information itself was intercepted unlawfully by someone else." 532 U.S. at 525. In support of this proposition the court cites and quotes *Florida Star*, which stated "[e]ven assuming the Constitution permitted a State to proscribe *receipt* of information, Florida has not taken this step." 491 U.S. at 536 (emphasis in original). Florida still has not taken that step, nor has Congress. Therefore, the otherwise-lawful receipt of unlawfully obtained information remains in itself lawful, even where the receiver knows or has reason to know that the source has obtained the information unlawfully.

Even less convincing is the majority's assertion that the Court mentioned the anonymity of the interceptor in *Bartnicki* several times and "distinguished this case on

that ground." Maj. Op. at 7. The so-called distinguishing of the case occurred in a footnote stating as follows:

> In the *Boehner* case, as in this suit, a conversation over a car cell phone was intercepted, but in that case the defendant knew both who was responsible for intercepting the conversation and how they had done it. In the opinion of the majority [of the D.C. Circuit], the defendant acted unlawfully in accepting the tape in order to provide it to the media.

532 U.S. at 522 n.5 (quoted at Maj. Op. at 7-8) (internal citations omitted). Today's majority hastens to say "[w]e do not want to read too much into the Court's 'but' in the first sentence, yet one must wonder why the Court drew this distinction if it meant to adopt the rule Representative McDermott urges on us." Maj. Op. at 8. The referenced footnote occurs in the Court's statement of the facts of the case and is never referenced in the legal analysis. Indeed, the footnote is subscribed to a textual sentence stating "[i]n so doing, [the Third Circuit dissenter] agreed with the majority opinion in a similar case decided by the Court of Appeals for the District of Columbia, *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999)." 532 U.S. at 522. If the Supreme Court in fact thought that the "distinction" was of constitutional significance, one must wonder why it thought the different results in the two circuit cases constituted a disagreement. This wonderment must be greatly enhanced upon reading the next sentence, which reads "[w]e granted certiorari to resolve the conflict." *Id.* The Supreme Court then goes on to resolve the conflict without making any further mention of any factual difference between the cases. To paraphrase the majority, one must wonder why the Court so easily dispensed with the distinction between one who knows who unlawfully intercepted a conversation and one who knows or has reason to know it was unlawfully intercepted. Indeed, the Supreme Court's disposition of the case lays to rest any distinction even between the one

who knows and the one who has reason to know. The Court reversed and remanded, directing entry of judgment for the defense on the constitutional theory. The record before the Court did not establish whether the defendants knew or only had reason to know of the unlawful obtaining of the conversations. If there were any such distinction in the High Court's view, the disposition would have been a vacatur and remand for the lower courts to establish upon which side of the "distinction" their case fell – that is, to determine whether the respondents knew or only had reason to know. As the Court made no such disposition, there is plainly no such distinction of constitutional magnitude.

The Supreme Court having decided the very issue of this case, that is, whether the United States (or Florida) can constitutionally bar the publication of information originally obtained by unlawful interception but otherwise lawfully received by the communicator, my opinion on whether that decision is correct or incorrect matters little. Nonetheless, I will venture to say that an opposite rule would be fraught with danger. Just as Representative McDermott knew that the information had been unlawfully intercepted, so did the newspapers to whom he passed the information. I see no distinction, nor has Representative Boehner suggested one, between the constitutionality of regulating communication of the contents of the tape by McDermott or by *The Washington Post* or *The New York Times* or any other media resource. For that matter, every reader of the information in the newspapers also learned that it had been obtained by unlawful intercept. Under the rule proposed by Representative Boehner, no one in the United States could communicate on this topic of public interest because of the defect in the chain of title. I do not believe the First Amendment permits this interdiction of public information either at the stage of the newspaper-reading public, of the newspaper-publishing communicators, or at the stage of Representative McDermott's disclosure to the news media. Lest someone draw a distinction between

the First Amendment rights of the press and the First Amendment speech rights of nonprofessional communicators, I would note that one of the communicators in *Bartnicki* was himself a news commentator, and the Supreme Court placed no reliance on that fact.

In sum, I respectfully dissent.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN A. BOEHNER,
Plaintiff,
v.
JAMES A. McDERMOTT,
Defendant.
Civ. No. 98-0594 (TFH)

MEMORANDUM OPINION

Pending before the Court are Plaintiff and Defendant's cross motions for summary judgment. Because both motions relate to the same set of facts and issues, the Court will rule on both motions simultaneously. Upon careful review of both motions, oppositions, replies thereto, and the entire record herein, the Court will grant Defendant's motion in part and deny the motion in part, and the Court will grant in part and deny in part Plaintiff's motion. [1]

I. BACKGROUND

This case results from a disclosure made by Defendant James McDermott to members of the press concerning an illegal intercept of a conference call

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[1] While Plaintiff indicated that he was willing to forego oral arguments, *see* Notice of Supplemental Authority at 2, Defendant "would welcome oral argument." Response to Notice of Supplemental Authority at 2. Pursuant to Local Civil Rule 7(f), the Court exercises its discretion and declines to schedule oral arguments on these motions. The pleadings submitted are very thorough, well-written, and detailed, and oral arguments would only serve to delay this case.

between Plaintiff John Boehner and several House Republican leaders. McDermott is a Democratic member of the House of Representatives, representing the Seventh District of Washington, and Boehner is a Republican member of the House of Representatives, representing the Eighth District of Ohio. The subject of the conversation was a discussion of potential responses to the House Ethics Committee Probe of then-House Speaker Newt Gingrich. Boehner Dep. at 15–16.

Boehner participated in the conference call on a cellular phone inside his car while parked at a Waffle House restaurant in northern Florida. Boehner Dep. at 9. The conference call was electronically intercepted by a Florida couple, Alice and John Martin, using a radio scanner. Def.'s Ans. ¶ 8. The Martins recorded the call and then delivered that tape to the Gainesville, Florida office of Democratic Representative Karen Thurman, who at the time represented the Fifth District of Florida. *See id.* ¶ 10. Representative Thurman advised the Martins to deliver the tape to Defendant, who was then a ranking Democratic member of the House Committee on Standards of Official Conduct ("House Ethics Committee"). *See* Cover letter of 1/8/1997 that the Martins presented to Defendant along with the tape (hereinafter "Cover Letter") (found at Pl.'s Statement of Undisputed Facts ("SUF") Ex. B-8).

On January 8, 1997, the Martins personally delivered a copy of the tape enclosed in an envelope to McDermott in the anteroom of the House Ethics Committee (the "Committee") in Washington, D.C. McDermott Dep. at 157–58. Along with the tape was a letter explaining that the tape contained "a conference call heard over a scanner," and that "[the Martins] understand that [the Martins] will be granted immunity." Pl.'s SUF Ex. B-8 (Cover Letter). Before this encounter, McDermott claims to have had no knowledge of either the Martins or the tape. *See* McDermott Decl. ¶ 3 (found at Def.'s Opp'n Ex. F). McDermott later that evening returned to his office, opened the envelope, and listened to the tape.

McDermott Dep. at 162. He maintains, however, that he has no recollection of seeing the accompanying letter at any time prior to his disclosure. *Id.* at 150.

That evening and the following day, McDermott disclosed the tape to the *New York Times* and the *Atlanta Journal-Constitution* *Id.* at 174–75. The *New York Times* published a story regarding the contents of the disclosed tape on the front page of its January 10, 1997 edition. Adam Clymer, *Gingrich is Heard Urging Tactics in Ethics Case*, N.Y. Times, Jan. 10, 1997, at A1 (found at Pl.'s SUF Ex. B-2). The article references only an anonymous Congressional source, but McDermott acknowledges that he was the source. McDermott Dep. at 220–21. At a press conference on January 13, 1997, the Martins declared that they were responsible for intercepting Plaintiff's conversation and identified McDermott as the person to whom they delivered a copy of the conversation. Def.'s Ans. ¶ 24. Only after the Martins' press conference did McDermott deliver copies of the conversation to other members of the House Ethics Committee. *Id.* 25. McDermott resigned from the committee the same day *Id.*

II. PROCEDURAL HISTORY

Plaintiff filed a complaint on March 9, 1998 alleging that Defendant knowingly disclosed an unlawfully intercepted communication in violation of federal wiretapping statue, 18 U.S.C. 23 § 2511(1)(c),[2] and a

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[2] 18 U.S.C. § 2511 provides, in pertinent part, that

(1) Except as otherwise specifically provided in this chapter any person who-. . . .

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

. . . .

Florida wiretapping statue, Fla. Stat. § 934.03(1)(c).[3] Plaintiff seeks recovery for damages under 18 U.S.C. § 2520 and Fla. Stat. § 934.10 that authorize private actions to recover for violations of the federal and state wiretapping statutes, respectively. This Court granted Defendant's motion to dismiss, finding that the First Amendment protected the disclosure of lawfully obtained information. *Boehner v. McDermott*, No. CIV. 98-594, 1998 WL 436897, *7 (D.D.C. July 28, 1998), *rev'd*, 191 F.3d 463 (D.C. Cir. 1999). The United States Court of Appeals for the District of Columbia reversed this Court by distinguishing McDermott's conduct from the controlling precedent in *Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989) ("If a newspaper lawfully obtains truthful information about a matter of public significance, then [the government] may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.") (quoting *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979)). *See Boehner v. McDermott*, 191 F.3d 463, 470–76 (D.C. Cir. 1999), vacated by 532 U.S. 1050 (2001). The Court of Appeals found that the federal and state wiretapping statutes were not unconstitutional as applied to McDermott. 191 F.3d at 478. The Supreme Court granted certiorari, vacated the judgment of the Court of Appeals, and remanded the case in light of its decision in *Bartnicki v. Vopper*, 532 U.S. 514 (2001). *McDermott v. Boehner*, 532 U.S. 1050 (2001). Finally, on remand from the Supreme Court, the Court of Appeals reversed this Court's dismissal of the case and remanded, stating "[w]e also conclude that we would benefit from having the district court pass upon the arguments that have taken on new-found importance after *Bartnicki*." *Boehner v.*

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shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

[3] Fla. Stat. § 934.03(1)(c) provides substantively identical language as 18 U.S.C. § 2511(1)(c).

McDermott, 22 Fed. Appx. 16, No. 98-7156, 2001 WL 1699420 (D.C. Cir. 2001).

Plaintiff filed the instant motion for summary judgment on Dec. 16, 2002. In that motion, Plaintiff claims that Defendant's knowledge that the tape was illegally intercepted and his subsequent disclosure of the tape to members of the press "triggers liability for both statutory and punitive damages." Pl.'s Mot. at 5. Defendant also filed a motion for summary judgment on Dec. 16, 2002, asserting that because the facts in the instant case are indistinguishable from *Bartnicki*, his disclosure was protected by the First Amendment. Def.'s Mot. at 12–13. Defendant also claims that the Florida statute does not apply to a disclosure that occurred entirely outside of Florida. *Id.* at 12.

III. MOTION FOR SUMMARY JUDGMENT

Summary judgment is appropriate only if the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (stating that a court may enter summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial"). A material fact is one that "might affect the outcome of the suit under the governing law . . . ." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). There is a genuine issue of material fact "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* In reviewing a motion for summary judgment, "[t]he evidence of the non-movant is to be believed, and all justifiable inference are to be drawn in his favor." *Id.* at 255. However, "[o]nly disputes over facts that might affect the outcome of the suit under governing law will properly preclude the entry of summary judgment." *Id.* at 248. "Credibility

determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . ." *Id.* at 255. Therefore, a trial court should use caution when granting summary judgment "where there is reason to believe that the better course would be to proceed to a full trial." *Id.*

Building on Anderson, our Court of Appeals stated that

> [i]n deciding whether there is a genuine issue of fact before it, the court must assume the truth of all statements proffered by the party opposing summary judgment — subject to an exception [that some statements are so conclusory as to come within an exception to that rule]. This is the standard even when the court entertains grave doubts about such a statement; like the weighing of evidence generally, the task of determining the credibility of a witness is the exclusive domain of the finder of fact.

Greene v. Dalton, 164 F.3d 671, 674 (D.C. Cir. 1999) (citations omitted).

IV. DISCUSSION

A. Applicability of the Florida Statute

Florida Statute § 934.03 provides language substantively identical to 18 U.S.C. § 2511, under which Plaintiff also seeks recovery, as well as to the analogous D.C. Code § 23-542. The Court, however, must assess the applicability of Florida law to the facts of this case, most of which occurred in the District of Columbia.

The locations of the events of this case are not in dispute. Plaintiff participated in a cell phone conversation in Florida that the Martins electronically intercepted in Florida. Boehner Dep. at 9; Def.'s Ans. ¶ 8. The Martins then traveled to the District of Columbia and delivered a copy of the recording to Defendant there. McDermott Dep. at 157–63. Defendant accepted materials from the Martins in the District of Columbia

and subsequently disclosed that information to the media in the District of Columbia. *Id.* at 157–63, 174–75. Based on these events, Plaintiff claims that Defendant violated Florida Stat. § 934.03(c), which prohibits disclosure of unlawfully intercepted communications. Pl.'s Mot. at 9.

Defendant argues based on two separate grounds that the Florida wiretapping statute does not apply to Defendant's disclosure in the District of Columbia. First, Defendant argues that Plaintiff has not established the Florida forum contacts constitutionally required under the Due Process and the Full Faith and Credit clauses. Def.'s Mot. at 23–25. Second, Defendant maintains that even if Florida law may be constitutionally applied in this case, Florida's strong presumption against extraterritorial application of its law prevents this Court from so extending the Florida statute. *Id.* at 21–23.

The due process and the full faith and credit clauses of the Constitution require that, in order to apply a state's law in a given case, the state "must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Allstate Ins. Co. v. Hague,* 449 U.S. 302, 312–13 (1981). Plaintiff first attempts to circumvent this constitutional requirement by demonstrating similarity between Florida wiretapping statute and the D.C. code wiretap provisions. Pl.'s Opp'n to Def.'s Mot. for Summ. J. ("Pl.'s Opp'n") at 18. Where an extraterritorial statute demonstrates no material conflict with locally applicable law, Plaintiff argues, there can be no "injury" and thus no constitutional issue raised by applying the extraterritorial statute. *Id.* Plaintiff draws this principle from *Phillips Petroleum Co. v. Shutts* in which the Supreme Court reviewed a state court's application of local law in favor of the law of fora more closely tied to the events of the case. 472 U.S. 797, 818 (1985).

Here, however, because Plaintiff failed to state a claim under the applicable D.C. Code provision, there is no selection to be made between Florida and District of Columbia. Extending the reasoning in *Phillips* to permit the application of Florida law in this case merely because of its similarity to the D.C. code would necessarily subject Defendant to claims under the laws of any state that evince sufficient similarity to the D.C. Code. Such reasoning is plainly incorrect and in direct opposition to the minimum contacts requirement established in *Allstate*.

Plaintiff fails to establish sufficient contacts between the events of this case and the state of Florida to constitutionally permit the application of Florida law. Plaintiff cites Defendant's testimony that "they [the Martins] told me they were in North Florida." Pl.'s Opp'n at 18 n.16 (citing Pl.'s SUF Ex. A, McDermott Dep. 158:11–12). Such incidental contact, however, is insufficient to demonstrate the "significant" Florida contact required. Rather, Plaintiff must show that Defendant "voluntarily and purposefully availed himself of the protection of the forum state's laws." *Richter v. Analex Corp.*, 940 F. Supp. 353, 359 (D.D.C. 1996) (quoting *Reiman v. First Union Real Estate Equity & Mortgage Investments*, 614 F. Supp. 255, 257 (D.D.C.1985)); *see also American Charities for Reasonable Fundraising Regulation, Inc. v. Pinellas County*, 221 F.3d 1211, 1216 (11th Cir. 2000) (requiring that a party perform some act by which it purposefully avails itself of forum law in order for that law to apply). Even if injuries incidentally flowed to parties in Florida as a result of Defendant's acts in the District of Columbia, that fails to demonstrate that Defendant purposefully availed himself of Florida law.

Plaintiff further alleges Florida contacts based on the reasoning that the state of Florida has suffered the adverse effects of "chilling" private speech due to Defendant's alleged violation. Pl.'s Opp'n at 17 (citing *Envtl. Def. Fund, Inc. v. Massey*, 986 F.2d 528, 531 (D.C.

Cir. 1993) (indicating that applying the law of the forum in which "adverse effects" are suffered is one of three scenarios that defeat a presumption against extraterritorial application of statutes)). *Massey*, however, dealt not with the issue of applying one state's law to another United States judicial forum, but instead with the issue of applying United States law to foreign matters. That holding does not directly address the Full Faith and Credit or the Due Process Clause requirements set forth in *Allstate*. Further, it is difficult to perceive how Defendant's actions in the District of Columbia would inflict any more severe a chilling effect on Florida than on any other state merely because the intercepted conversation originally occurred in Florida.

Even if Florida law could constitutionally apply in this case, Florida's strong presumption against extraterritorial application of its law prohibits its application in this case. Florida courts have consistently declined to apply Florida law outside territorial boundaries unless a statute contains an "express intention that its provisions are to be given extraterritorial effect." *Burns v. Rosen*, 210 So. 2d 629, 630 (Fla. Dist. Ct. App. 1967); *see also Southeastern Fisheries Ass'n, Inc. v. Dep't of Natural Res.*, 453 So. 2d 1351, 1355 (Fla. 1984) (declining to extend law extraterritorially absent express intent of the legislature to do so). Plaintiff's reliance on *Massey* to avoid this problem is again misplaced here as that case does not address Florida's application of Florida law to other states but rather the application of United States law to foreign matters. Thus, even if constitutionally permissible, this Court cannot contravene the Florida courts' requirement of expressed legislative intent to apply its law extraterritorially.

Therefore, Defendant is entitled to summary judgment regarding Fla. Stat. §§ 934.03, 934.10 because Defendant did not avail himself of the protection of Florida law and because the Florida statute does not apply extraterritorially.

B. Significance of the Vacated Court of Appeals Decision

As discussed earlier, this case first came before the Court of Appeals for the District of Columbia on an appeal from this Court's granting of Defendant's original motion to dismiss. *Boehner*, 191 F.3d at 466. The Court of Appeals reversed this Court's ruling and denied Defendant's motion to dismiss. *Id.* at 478. Defendant appealed, and subsequently the Supreme Court issued an order granting certiorari, vacating the judgment of the Court of Appeals, and remanding the case (the "GVR" order) for further consideration in light of its recent decision in *Bartnicki*. 523 U.S. 1050 (2001). The Court of Appeals, in turn, reversed the judgment of this Court, remanded the case, and allowed Plaintiff to file an amended complaint. 22 Fed. Appx. at 17. The parties now dispute the significance, if any, of the vacated Court of Appeals judgment.

As a preliminary matter, because the ruling by the Court of Appeals came on a motion to dismiss, that court was constrained to "take as true the allegations made by [Plaintiff] in his complaint." *Boehner*, 191 F.3d 463, 464 n.1. On motions for summary judgment, this Court accepts all evidence in favor of the non-moving party and is not bound by the factual assertions accepted by the Court of Appeals. Defendant is correct in asserting that a general order of the Supreme Court vacating the judgment of the Court of Appeals "deprives [the Court of Appeals's] opinion of precedential effect." *Los Angeles County v. Davis*, 440 U.S. 625, 634 n.6 (1979) (quoting *O'Connor v. Donaldson*, 422 U.S. 563, 577–78 n.12 (1975)). The Supreme Court's GVR order in this case, however, was not a general vacation but rather a specific order vacating the Court of Appeals' judgment and remanding for further consideration in light of the Supreme Court's decision in *Bartnicki*. *Boehner*, 532 U.S. 1050. Such a GVR order that directs reconsideration in light of a new Supreme Court decision "is of a much more limited nature" than a general vacation. *United States v.*

M.C.C. of Florida, Inc., 967 F.2d 1559, 1562 (11th Cir. 1992) (determining that a GVR order issued by the Supreme Court instructing further consideration in light of a recent decision did not "nullify all prior proceedings"). Further, "[v]acatur and remand by the Supreme Court . . . does not create an implication that the lower court should change its prior determination." *Hughes Aircraft Co. v. United States*, 140 F.3d 1470, 1473 (Fed. Cir. 1998).

Additionally,

> [a]lthough a decision vacating a judgment necessarily prevents the opinion of the lower court from being the law of the case, the expressions of the court below on the merits, if not reversed, will continue to have precedential weight and, until contrary authority is decided, are likely to be viewed as persuasive authority if not the governing law of the . . . Circuit.

Kurtz v. Baker, 644 F. Supp. 613, 621 (D.D.C. 1986) (citing *Davis*, 440 U.S. at 646 n.10 (Powell, J., dissenting)). Although no longer the law of the case, a vacated opinion may serve as a valuable source of guidance on the legal issues raised in the absence of contrary authority. *Christianson v. Colt Indus. Operating Corp.*, 870 F.2d 1292, 1298 (7th Cir. 1989) (holding that an opinion vacated on jurisdictional grounds "stands as the most comprehensive source of guidance available on the . . . questions at issue in this case"). Moreover, "where [a] circuit court decision is vacated for reconsideration, rulings on unrelated issues continue to have precedential effect." *Metro. Wash. Airports Auth. Prof'l Fire Fighters Ass'n Local 3217 v. United States*, 959 F.2d 297, 304–05 (D.C. Cir. 1992) (paraphrasing the D.C. Circuit rule regarding vacated opinions established in *Action Alliance of Senior Citizens v. Sullivan*, 930 F.2d 77, 83–84 (D.C. Cir. 1991)); *see also Edmond v. U.S.P.S. Gen. Counsel*, 949 F.2d 415, 424 n.17 (D.C. Cir. 1991) ("Indeed, this circuit has more than once cited [a particular vacated opinion] as authority for legal

propositions that were not disturbed by the decision on rehearing.").

Consequently, while Defendant accurately asserts that the vacated Court of Appeals decision does not strictly bind this Court, prudence counsels against wholly disregarding the residual authority of the vacated opinion. The Court of Appeals's reverse and remand order clarified the scope of this Court's current task. In that order, the Court of Appeals indicated it would benefit from this Court "pass[ing] upon the arguments that have taken on new-found importance after *Bartnicki*." *Boehner*, 22 Fed. Appx. at 17. The Court of Appeals also indicated that "the constitutional issues now raised may more readily be decided if [Plaintiff] is given an opportunity to amend his complaint." *Id.* The scope of this Court's task on remand is thus clear. In its determination of summary judgment, this Court will take into account Plaintiff and Defendant's amended arguments, the new evidence submitted, and the entire record herein. Further, the Court will assess these arguments in light of all existing authority, including the Court of Appeals's vacated opinion and the Supreme Court's decision in *Bartnicki*.

C. The Scope of First Amendment Protection

At issue throughout this ongoing litigation has been the scope of protection afforded by the First Amendment as it applies to Defendant in this case. To refine the First Amendment issue presented, it is helpful to characterize with particularity the events giving rise to the instant dispute. First, it is undisputed that the Martins' initial act in recording Plaintiff's conference telephone conversation on December 21, 1996 violated 18 U.S.C. § 2511(1)(a), prohibiting the intentional intercept of electronic communications. Def.'s Ans. ¶¶ 8, 30. The Martins were charged with and pleaded guilty to this offense on April 25, 1997, and were each fined $500. Def.'s Opp'n Ex. T (DOJ Press Release Regarding Martins' Sentencing). Second, it is undisputed that the

Martins disclosed the recording to McDermott on January 8, 1997. McDermott Dep. at 157–63. Both the Court of Appeals and this Court noted that by this disclosure of unlawfully obtained material the Martins likely violated 18 U.S.C. § 2511 again, although they were not charged with that separate offense. *Boehner*, 191 F.3d at 475–76 (concluding that "[t]he Martins violated § 2511 not once, but twice — first when they intercepted the call and second when they disclosed it to McDermott); *Boehner*, 1998 WL 436897, at *4 (noting that "the wiretap statutes prohibit the Martins' interception, and the Martins' disclosure of the tape"). The third significant event leading to the ultimate public disclosure of the tape was McDermott's receipt and retention of the tape and cover letter from the Martins. As will be addressed in subsequent analysis, the parties dispute the lawfulness of this third event. Fourth and finally, the parties do not dispute that on the evening of January 8, 1997, McDermott disclosed the material he received from the Martins to the press. McDermott Dep. at 183.

As a preliminary matter, the Court finds that by the time Defendant disclosed the tape to the media, he knew or had reason to know that the tape had been obtained through the unlawful interception of communications. Upon discovering that the tape presented by the Martins, two private citizens from Florida, contained a recorded telephone conversation among several high level government representatives, Defendant would have every reason to realize that the conversation had been illegally intercepted. Defendant concedes that he drew a similar conclusion upon listening to the tape, stating that "I had a CB radio in my car and I used to listen to people's conversations all the time. So I could imagine that that might have been how [the recording] happened. . . . [T]hat's kind of what I thought when I heard it." McDermott Dep. at 181. Further, Defendant acknowledges that he did not believe the Martins had been invited participants in the call. *Id.* at 182–183. Finally, it is undisputed that, after listening to the tape,

Defendant proceeded to intentionally disclose the contents of the tape to several members of the media, including Adam Clymer of the *New York Times* on January 8, 1997. *Id.* at 183, 186–87. As a result, the Court finds that Defendant violated 18 U.S.C. § 2511(1)(c).

In *Bartnicki*, the Supreme Court held that where information of public importance is illegally intercepted, 18 U.S.C. § 2511(1)(c) is unconstitutional as applied to a third party who lawfully receives the intercepted information and discloses it to the media. 532 U.S. at 535 (stating that "a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern"). In light of *Bartnicki*, the issue now squarely before this Court is whether 18 U.S.C. § 2511(1)(c) is unconstitutional under the First Amendment as applied to Defendant in this case. Put another way, the issue is whether the First Amendment shields Defendant's disclosure from liability under the applicable wiretapping statutes.

Like this case, *Bartnicki* also involved information initially obtained in violation of 18 U.S.C. § 2511 and subsequently disclosed by a third party. In *Bartnicki*, a radio commentator and several other media defendants published information from a tape which contained an illegally intercepted cell phone conversation between the petitioners. *Bartnicki*, 532 U.S. at 518. The *Bartnicki* petitioners were at the time involved in contentious negotiations between a union representing teachers and a local school board, and in their intercepted conversation they made several comments apparently threatening physical harm in regard to the negotiations. *Id.* at 518–19. The tape was discovered by respondent Yocum in his mailbox, and the source of the tape was never identified. *Id.* at 518–19.

Due to the procedural posture of *Bartnicki*, the Supreme Court "accept[ed] respondents' submission on three factual matters that serve to distinguish most of the

cases that have arisen under § 2511." *Id.* at 525. Specifically, the Supreme Court accepted that the respondents played no part in the illegal interception, that their access to the information was obtained lawfully, and that the conversations dealt with a matter of public concern. *Id.* The Supreme Court noted that, despite obtaining the material lawfully themselves, respondents at minimum had "reason to know" the original interception was unlawful presumably by the time of their respective disclosures.[4] *Id.* The Supreme Court stated that the case "present[ed] a conflict between interests of the highest order — on the one hand, the interest in the full and free dissemination of information concerning public issues, and, on the other hand, the interest in individual privacy and, more specifically, in fostering private speech." *Id.* at 518. Ultimately, the Supreme Court held that such disclosures were protected by the First Amendment because "[i]n these cases, privacy concerns give way when balanced against the interest in publishing matters of public importance." *Id.* at 534. The Supreme Court concluded "that a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern." *Id.* at 535.

In reaching this conclusion, however, the Supreme Court noted that its "holding, of course, does not apply to punishing parties for obtaining the relevant information

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[4] While not specifying at what point it charged the respondents in *Bartnicki* with "reason to know" of the illegality of the original interception, *see Bartnicki*, 532 U.S. at 524–25, the Supreme Court noted respondent Yocum's testimony that he initially discovered only a tape anonymously placed in his mailbox and that he "recognized the voices of Barnicki and Kane." *Id.* at 519. The Supreme Court thus presumably charged Yocum with knowledge of the illegality of the original interception at some point after receiving and listening to the tape but prior to disclosing it. *Id.* at 525.

unlawfully." *Id.* at 532 n.19. In his concurring opinion, Justice Breyer addressed the lawfulness of the third party in obtaining the information. He stated that "[n]o one claims that [the media respondents] ordered, counseled, encouraged, or otherwise aided or abetted the interception, the later delivery of the tape by the interceptor to an intermediary, or the tape's still later delivery by the intermediary to the media." *Id.* at 538 (Breyer, J., concurring). Justice Breyer agreed with the majority's holding, but he "would not extend th[e] holding beyond [the] present circumstances." *Id.* at 541 (Breyer, J., concurring).

Defendant asserts that this case is indistinguishable from *Bartnicki*. Plaintiff, however, raises three separate grounds which, if valid, would serve to distinguish this case from *Bartnicki*: (1) whether, in light of *United States v. Aguilar*, 515 U.S. 593 (1995), Defendant's disclosure violated special duties imposed on him as then-ranking member of the House Ethics Committee, (2) whether Defendant's receipt of the tape from the Martins was so closely tied by knowledge and action to the Martins's illegal disclosure that Defendant obtained the information unlawfully, and (3) 18 U.S.C. § 2511(1)(c) would survive First Amendment scrutiny even if *Bartnicki* fully applied, because the statute is constitutional under the fact-specific balancing test set forth in that opinion.[5]

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[5] As described below, the Court finds that Defendant unlawfully obtained the information on the tape, and therefore the facts of the instant case set it apart from *Bartnicki*. For this reason, the Court does not find it necessary to address the merits of Plaintiff's third argument (*i.e.*, even if *Bartnicki* fully applied, the statute is constitutional under the fact-specific balancing test set forth in that opinion). The Court will address, however, Plaintiff's *Aguilar* argument, as it raises important issues that are worthy of discussion on the merits.

1. Defendant's Status as Then-Ranking Member of the House Ethics Committee

Plaintiff contends that, unlike in *Bartnicki*, finding Defendant liable for violating § 2511(1)(c) survives a First Amendment test here because Defendant's disclosure is governed by the Supreme Court's decision in *United States v. Aguilar*, 515 U.S. 593 (1995). *Aguilar* held that disclosures by certain public officials are not protected by the same stringent First Amendment scrutiny as disclosures by ordinary citizens. *Id.* at 606. In *Aguilar*, a federal judge disclosed information about the existence of a wiretap to the subject of the surveillance, thus violating a federal law. *Id.* His conviction was affirmed under a diminished standard of First Amendment scrutiny because the Supreme Court held that he voluntarily assumed a duty of confidentiality with regard to the information he disclosed. *Id.*

Plaintiff argues that *Aguilar* is indistinguishable from the instant case because the House Ethics Committee Rules (the "Committee Rules") regarding disclosures justify applying a lower standard of First Amendment Protection to Defendant's disclosure.[6] To the contrary, Defendant insists that he must be afforded the same First Amendment protection as any other public citizen because he did not receive the information in his official capacity as a member of the Committee, and that his disclosure was not governed by a pre-existing duty not to disclose similar to that in *Aguilar*. As explained below,

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[6] The Rules of the Committee on Standards of Official Conduct 10(b) [entitled "Committee Records"] (now Rule 12(b)) states: "Members and staff of the Committee shall not disclose to any person or organization outside the Committee, unless authorized by the Committee, any information regarding the Committee's or a subcommittee's investigative, adjudicatory or other proceedings . . . ." Pl.'s SUF Ex. B-7 ("Rules Adopted by the Committee of the House of Representatives (104th Congress, 1995–1996)).

McDermott's argument fails as to his point regarding how and why he received the information, but his argument succeeds as to whether he was under a preexisting duty greater than that required of any citizen.

(a) Whether McDermott Received the Information In His Official Capacity As A Member of the Committee

Defendant argues that

> [b]ecause [he] did not receive the information on the tape from a fellow Committee member, as part of a Committee briefing, or from a witness in a closed Committee hearing, and because lawfully could have received the tape even if he were not a member of Congress, *Aguilar* cannot be used to contradict what *Bartnicki* commands.

Def.'s Reply at 9. Specifically, McDermott artfully pleads that he did not "obtain[] the information in his official capacity as a member of the Ethics Committee. Instead, . . . he received it from private citizens, not from (or through) the Committee. . . . [He] obtained the information from the Martins in his 'unofficial political capacity,' rather than his 'official ethical capacity.'" Def.'s Mot. at 18–19 (internal citations to *Boehner*, 191 F.3d at 486 (Sentelle, J., dissenting)). Such are Defendant's arguments to the Court; however, the cover letter itself and the documents produced by McDermott in discovery show a different version of events. First, the cover letter reads as follows:

January 8, 1997

Committee On Standards of Official Conduct
HT2 Capital
20515–6328

Jim McDermott, Ranking Member

Enclosed in the envelope you will find a tape of a conversation heard December 21, 1996 at about 9:45 a.m. The call was a conference call heard over a scanner. We

felt the information included were [sic] of importance to the committee. We live in the 5th. Congressional District and attempted to give the tape to Congresswoman Karen Thurman. We were advised by her to turn the tape directly over to you. We also understand that we will be granted immunity.

. . . We pray that committee [sic] will consider our sincerity in placing it in your hands.

We will return to our home today.

Thank you for your consideration.

John and Alice Martin
[Address and phone number omitted herein.]

Cover Letter (found at Pl.'s SUF Ex. B-8). Based on the plain text of the cover letter, it is undisputed that the Martins were told to and did seek out McDermott because he was Ranking Member of the House Ethics Committee and because the information on the tape pertained to that Committee's pending investigation of Newt Gingrich.

Second, McDermott, and others acting on his behalf, have solicited funds from people in McDermott's district and elsewhere in order to pay for the legal fees incurred as a result of the instant litigation. The materials sent out as part of this fundraising campaign show that McDermott himself believes he was acting in his official capacity as a member of the Ethics Committee. The following examples demonstrate this, and are numbered as they appear in Exhibit L of Plaintiff's Undisputed Facts:

— Ex. L; M000001 (Fundraising Letter from Def., dated 12/14/2000):

In 1993, when Speaker Tom Foley asked me to chair the House Ethics Committee, I could not have envisioned that six years later, I would be writing this letter to you. But I fell heir to chairing the Committee when it undertook consideration of the Newt Gingrich case.

As that case proceeded, I was sued in federal court by John Boehner. . . .

Throughout this protracted process, my position has rested upon the protections afforded all Americans by the First Amendment. The effort has been extremely costly, and I now find myself in need of your help. . . .

To meet this obligation, I have established the Jim McDermott Legal Expense Trust . . . .

— Ex. L; M000003 (Fundraising Letter from Thomas S. Foley, dated 06/19/2001):

"Jim McDermott has been targeted and attacked [in this lawsuit] by Republicans because of his work on the Ethics Committee."

— Ex. L; M000005 (Fundraising Letter from Andrew L. Stern, International President of Service Employees International Union, dated 08/13/2001):

"Jim [McDermott] was sued in federal court by Congressman John Boehner (R-OH) because of his role in the investigation that led to then-Speaker Newt Gingrich's resignation from Congress."

— Ex. L; M000006 (Fundraising Letter from Def., dated 02/08/2001):

"Thank you for your offer to assist my Legal Expense Trust. The Congress allows it members to establish such trusts to pay legal expenses incurred in connection with official duties or a position in Congress."

— Ex. L; M000027 (Fundraising Letter from Richard A. Gephardt, dated 09/06/2001):

"As a result of performing his duties, [Jim McDermott] has found himself faced with onerous legal expenses in the defense of our First Amendment rights."

— Ex. L; M000035 (Fundraising Solicitation from "Friends for Jim McDermott," undated):

"The Jim McDermott Legal Expense Trust has been created exclusively to defray legal costs that have been

and will be incurred in connection with Congressman McDermott's official duties and position in Congress."

These documents could not make it more clear that Defendant believes he was acting in his official capacity as a member of the Ethics Committee. In 1999, Judge Sentelle wrote the following:

> Appellant and intervenor argue that McDermott can be punished for his disclosure because of his having, in their view, obtained the information at issue in his capacity as a member of the House Ethics Committee. I cannot agree. McDermott did not in fact obtain the information in his official capacity. The felons who communicated it to him were not looking for him to use his official ethical capacity but rather his unofficial political capacity to disseminate their unlawfully obtained information. It may well be the case that had he obtained the same information, for example, by Committee subpoena, he could not have lawfully disclosed it and his disclosure would not be constitutionally protected. Indeed, that is perhaps more likely than not. But those are not the facts before us.

Boehner v. McDermott, 191 F.3d at 485–86 (Sentelle, J., dissenting). Judge Sentelle reached this conclusion, however, without the benefit of the above information that was obtained through discovery. Through his own fundraising materials, McDermott has admitted that he believes otherwise. In this light, and based on the plain text of the cover letter, Defendant's argument that he received the tape from the Martins in his "unofficial political capacity" is without merit.

(b) Whether McDermott Was Under A Pre-existing Duty Not to Disclose

While it is not for the courts to interpret or enforce Congressional rules, Plaintiff argues that *United States v. Rostenkowski*, 59 F.3d 1291 (D.C. Cir. 1995), permits this Court to take limited judicial cognizance of the

Committee Rules to the extent of determining whether Defendant's disclosure violated any special duty similar to that found in *Aguilar*. Pl.'s Mot. at 15 n.11. To support the alleged rule violation, Plaintiff emphasizes Defendant's admission [through counsel] that he was given the tape because of his position as a ranking member of the House Committee. Pl.'s Opp'n at 9–10 (citing Pl.'s SUF Ex. I, July 17, 1998 Hrg. Tr. at 22:10–11; 15:21–16:5; 24:3). *Rostenkowski* permits the courts to take limited judicial cognizance of the rules of Congress; however, it also makes clear that it is outside the realm of the courts to construe Congressional rules that present significant ambiguities. 59 F.3d at 1312 (holding that where there is "reasonable doubt" as to the application of a Congressional rule, the court "cannot presume to interpret it"). In the case at hand, a significant ambiguity exists as to whether the Committee's non-disclosure rule (*i.e.*, the former Rule 10(b)) applies to unsolicited, illegal information presented outside the Committee by private citizens. Further, the contents of the tape in which both members of Congress and nonmembers privately discuss political responses to a Committee ruling may or may not be "information regarding the Committee's . . . proceedings" within the meaning of the Committee Rule. While the Court has found that the Martins did present their recording to Defendant due to his position on the Committee, it is not apparent that the Martins' decision in that regard materially affects whether the information falls within the scope contemplated by the Committee Rules.

Further, Congress altered the scope of the Ethics Committee non-disclosure rules in the wake of the events of this case by subsequently instituting an oath requiring members to swear not to disclose any information "received in the course of [one's] service with the committee." 143 Cong. Rec. H7544-02 (1997). This subsequent clarification fuels doubt as to whether the Committee Rules as written at the time of Defendant's disclosure in fact prohibited Defendant's disclosure.

Overall, this Court declines to interpret the Committee Rules as they stood at the time to determine whether Defendant's actions violated any special duty of confidentiality imposed on him.

Plaintiff argues in the alternative that even if Defendant's disclosure violated no specific duty under the Committee Rules, the confidentiality duty imposed in *Aguilar* did not derive from formal rules. Plaintiff thus urges that Defendant was under a general Congressional nondisclosure duty that "goes without saying." Pl.'s Mot. at 18. The duty invoked in *Aguilar*, however, was the "universally recognized" duty of confidentiality with regard to communications between judicial colleagues concerning sensitive information. *United States v. Aguilar*, 994 F.2d 609, 616 (9th Cir. 1993), *opinion withdrawn by* 21 F.3d 1475 (9th Cir. 1994) (en banc), *reversed on grounds other than this point*, 515 U.S. 593 (1995); *see also Aguilar*, 515 U.S. at 605–06 (Judge Aguilar was not "simply a member of the general public who happened to lawfully acquire possession of information about the wiretap; he was a Federal District Court Judge who learned of a confidential wiretap application from the judge who had authorized the interception, and who wished to preserve the integrity of the court."). Here, by contrast, Defendant received information from members of the general public unconnected to Congress or to the Committee outside of Committee proceedings. While one would expect the Chairman of the Ethics Committee to handle such information in an ethically judicious manner, the law has not previously recognized a general Congressional duty of non-disclosure and this Court declines to create such a duty here.

(c) Conclusion Regarding Applicability of *Aguilar* to This Case

This Court originally held that *Aguilar* was distinguishable from the instant case since McDermott had "no such independent duty not to disclose

information; the restriction on disclosure derive[d] solely from the federal and state statutes themselves." *Boehner*, 1998 WL 436897, at *6. The Court of Appeals agreed, stating that while McDermott did receive the tape under a duty not to disclose, that duty "arose from a statute — § 2511(1)(c)." *Boehner*, 191 F.3d at 477. Nothing in the vacated court of appeals opinion nor in the Supreme Court's decision in *Bartnicki* suggests expanding the holding in Aguilar to apply to Defendant's disclosure. Indeed, no legal authority has since come to light that would warrant departure from that position. Therefore, while it is clear that McDermott received the information from the Martins in his official political capacity, the Court does not find that he was under an independent preexisting duty greater than that required of any citizen.

2. The Lawfulness of the Manner In Which Defendant Obtained the Information

As described above, this Court has concluded that Defendant's ultimate disclosure of the Martins' tape violated 18 U.S.C. § 2511(1)(c). The Supreme Court noted, however, that whether the First Amendment shields a defendant from liability under that statute substantially depends upon the lawfulness of the manner in which he initially obtained the information. *See Bartnicki*, 532 U.S. at 532 n.19 (noting that the First Amendment protection applied to the disclosure in that case "does not apply to punishing parties for obtaining the relevant information unlawfully"). Where a defendant unlawfully obtains information, neither *Bartnicki* nor any other authority shields against liability for subsequent disclosure.

On Defendant's earlier motion to dismiss, this Court held that Defendant had not unlawfully obtained the tape from the Martins. *Boehner*, 1998 WL 436897, at *4. The Court reasoned that Defendant could not have unlawfully obtained information because his receipt of it was not expressly prohibited by statute. *Id.* (holding that "[b]ecause defendant did not break any laws in taking

possession of the tape, he lawfully obtained that information"). As a result, the Court reluctantly held that Defendant had exploited a loophole. *Id.* As a result, the Court concluded that "neither statute nor caselaw provides substantial basis to conclude that defendant unlawfully obtained the taped conversation." *Id.*

The Court of Appeals, however, specifically found otherwise. In reaching this conclusion, the Court of Appeals assumed all facts as presented by Plaintiff. *Boehner*, 191 F.3d 463, 464 n.1. Both the majority and the concurring Court of Appeals opinions ruled that Defendant had obtained the tape through an "illegal transaction." 191 F.3d at 475–76, 479. As a result, the majority held that "the illegal activity of the Martins, of which McDermott was well aware when he took possession of the tape," took this case outside the Florida Star line of cases that protects lawfully obtained information. *Id.* at 476. The court explained that "[a]gain and again [Defendant] insists that he 'lawfully obtained' the tape. By this he means that he broke no law in taking possession of the tape. But this is hardly certain. . . . By accepting the tape from the Martins, McDermott participated in their illegal conduct." *Id.* at 475–76. The concurring opinion further articulated this reasoning, stating

> [n]ot only was the transaction in which McDermott obtained the tape therefore illegal — albeit only the Martins could be punished for effectuating it — but McDermott knew the transaction was illegal at the time he entered into it. One who obtains information in an illegal transaction, with full knowledge the transaction is illegal, has not 'lawfully obtain[ed]' that information in any meaningful sense.

Id. at 479 (Ginsburg, J., concurring) (footnote and internal citation omitted). Overall, both the majority and the concurrence found that because the transaction in which Defendant obtained the tape was illegal and

because he knew it to be so at the time he took possession, his actions and knowledge placed this case outside the *Florida Star* line of cases protecting disclosure of lawfully obtained information. Intermediate scrutiny would therefore apply. *Boehner*, 191 F.3d at 479 (Ginsburg, J., concurring) ("Because McDermott did not in fact lawfully obtain the tape, however, he may be punished under § 2511(1)(c), as he concedes, if the statute as applied to him survives intermediate scrutiny."); *id.* at 480 (Ginsburg, J., concurring) ("[I]f *Florida Star* does not require the application of strict scrutiny in this case, then we should apply at most intermediate scrutiny.")

As a result, the conclusion to be drawn from that court's opinion is that even though 18 U.S.C. § 2511 does not specifically prohibit the receipt of illegally obtained information, Defendant did not lawfully obtain the material if he knew of the illegality of the Martins' disclosure at the time he voluntarily accepted it. The Court of Appeals thus examined the scenario in which a source obtains information illegally and passes it to an intermediary, and that court found that an intermediary's present knowledge of the illegality of a source's disclosure at the time the intermediary accepts it renders the intermediary's obtaining of the information unlawful.

Bartnicki does not disturb that point of law because the Supreme Court merely "accept[ed] respondents' submission" in that case on the assertion that the parties had lawfully obtained access to the intercepted information in that case. 532 U.S. at 525. The defendants' actions in *Bartnicki* did not present a knowing acceptance scenario such as is alleged here. In *Bartnicki*, the first known link in the chain of the illegally intercepted information was defendant Yocum. *Id.* at 519. Yocum obtained the illegally intercepted information by unwittingly retrieving an unsolicited tape anonymously placed in his mailbox. *Id.* The Supreme Court held that Yocum's subsequent disclosure of the illegally intercepted, but publicly valuable, information to

defendant Vopper was therefore protected under the First Amendment. *See id.* at 534. Inductively, then, radio commentator Vopper's receipt of the information was similarly found to be lawful and his disclosure of the information on his radio show was protected. *See id.* Identical reasoning applies to all media defendants who subsequently obtained and disclosed based on Vopper's radio account.

For purposes of this case, the *Bartnicki* ruling in relation to defendant Yocum's actions is extremely relevant. Examining Yocum's actions, *Bartnicki* necessarily stands for the proposition that a defendant who anonymously receives illegally intercepted information without present knowledge of its illegality has obtained it lawfully. *See* 532 U.S. at 525. The vacated Court of Appeals opinion, by contrast, concluded that a defendant who accepts information from a source with present knowledge of source's identity and the illegality of the source's disclosure has himself unlawfully obtained it. *Boehner*, 191 F.3d at 476, 479.

This Court finds no conflict between those independent propositions. The Supreme Court acknowledged this differentiation but expressed no view on it, noting only that "[i]n the *Boehner* case . . . the defendant knew both who was responsible for intercepting the conversation and how they had done it. In the opinion of the majority, the defendant acted unlawfully in accepting the tape in order to provide it to the media." *Bartnicki*, 532 U.S. at 522 n.5 (internal citation omitted). The Supreme Court further emphasized that "a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern." *Id.* at 535 (footnote omitted). This again distinguishes the stranger's act in *Bartnicki* with the Court of Appeals's reasoning in which a recipient knows of both the identity and the illegal means by which a source has obtained the information. Moreover, the distinction drawn creates sound policy because a recipient's present knowledge of

illegality of a disclosure implicates the choice to condone it by accepting the information or to prevent it by declining to participate. In contrast, punishing a defendant who accepts an anonymous disclosure with no knowledge of the illegality of the disclosure can deter nothing. Consequently, this Court declines to depart from the reasoning in the vacated Court of Appeals opinion to the extent that it remains undisturbed by the holding in *Bartnicki*.

Summary judgment requires the Court to determine from the record before it whether undisputed facts cast this case under the Court of Appeals' reasoning or the *Bartnicki* holding, or whether facts in dispute control that determination. The primary distinction between those scenarios rests on what Defendant knew about the illegality of the information he accepted and when he knew it. In this case, the Martins supplied with their tape a cover letter that introduces themselves and explains their illegal interception. McDermott Dep. at 266; *see also* Cover Letter (Pl.'s SUF Ex. B-8). It is clear that at some point McDermott knew that the tape was illegally obtained. Of course, the crucial question in this case is when did he learn it and, consequently, whether he participated in the illegal conduct of the Martins. If Defendant read the cover letter or the Martins related its relevant contents to him at the time Defendant received the tape, he would have possessed sufficient knowledge of the illegal transaction to have unlawfully obtained the tape as per the Court of Appeals's reasoning. On the other hand, if Defendant learned of the contents of the letter at some later time after taking possession of the tape, the Court of Appeals's reasoning no longer applies and the case more closely resembles *Bartnicki*, wherein

> respondents played no part in the illegal interception. Rather, they found out about the interception only after it occurred, and in fact never learned the identity of the person or persons who made the interception. Second, their access to the information on the tapes was

> obtained lawfully, even though the information itself was obtained unlawfully by someone else.

Bartnicki, 532 U.S. at 525.

Defendant maintains only that he has no recollection of reading the cover letter prior to his disclosure of the tape and that the Martins provided no relevant information to him other than their names and the area of their home state in which they lived. McDermott Dep. at 150, 158. Not only does common sense dictate that one who accepts from strangers a package with a short accompanying letter is likely to read the letter, but — as explained below — strong evidence indicates that Defendant knew of the information contained in the letter at the time he assumed possession of the tape. Defendant counters this by asserting that the letter was actually included inside the envelope with the tape, hidden from his view at least until his later review of the materials. Def.'s Opp'n at 11. He claims that

> the letter was sealed inside the accompanying 8-1/2" by 11" packing envelope, making it impossible to charge McDermott with knowledge of its contents when he received the envelope from them. McDermott did not open the envelope until after he left the Martins, and did not notice the cover letter even then, when only the tape fell out. (McDermott Dep. at 150:14–25, 154:14–17, 164:3–5 ("I opened the envelope and dumped it out and there was a tape and put it my [tape player] and listened to it."); *see also id.* at 159:9 (describing the 8-1/2" by 11" packing envelope).)

Id. at 6 (emphasis in original). This assertion that the letter was hidden inside the envelope is totally unsupported by the record, however, and was not specifically claimed by McDermott until his attorneys stated such in Defendant's opposition to Plaintiff's motion for summary judgment. He cites no evidence demonstrating that the letter was "sealed inside" the

envelope as opposed to taped to the outside of it;[7] rather, he argues that "[t]here is no basis for Boehner's assertion that because McDermott does not recall seeing the letter, he necessarily must have read it . . . ." Def.'s Opp'n at 12 n.5. Indeed, his own deposition passages that he cites merely reiterate that he could not recall reading the cover letter.[8] None of his other filings with this Court lend

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[7] Shortly after the topic of the cover letter was raised at Defendant's deposition, a discussion ensued among counsel as to whether the cover letter Defendant turned over in discovery to Plaintiff came from Defendant's files or from some other source. *See generally* McDermott Dep. at 151–153. This distinction was meaningful, Defendant's counsel argued during the deposition, because

> [i]n our search of [Defendant's and Defendant's counsel's] records to produce to [Plaintiff] we found no copy of the letter. Otherwise we would have produced it to you from that source. But we did have a copy we had obtained from the Department of Justice as the fax line [at the top of the document] indicates and we produced that one. . . . But it didn't come from [Defendant's] files.

Id. at 151:19–152:1. The Court infers that this discussion occurred during the deposition to support a future assertion that Defendant never saw the cover letter, but the specific issue as to whether or not Defendant's files contained a copy of the cover letter was not raised in any of Defendant's summary judgment pleadings. The reason that DOJ had the cover letter in the first place, however, is because DOJ received it from the House Ethics Committee on January 13, 1997, which in turn received it that same day from McDermott. *See* Letter from Chief Counsel of Ethics Committee (found at Pl.'s SUF Ex. B-9).

[8] Defendant's deposition at 150:14–25 reads:

> [Q] Do you not recall seeing the cover letter or are you denying — do you have a recollection that there was no cover letter?
>
> [A] No, I can't remember. I can't remember seeing the letter.

support to his claim. For example, McDermott's Answer to the Complaint states that he "slit open the envelope in his office and shook out the Tape. He does not recall seeing the letter." Def.'s Answer at 7. His Declaration of December 16, 2002 does not address the cover letter. In fact, other than the unsupported assertion in his opposition, McDermott has provided no declaration, affidavit, or other evidence indicating that the cover letter was sealed inside the envelope and thus potentially out of his view.

The wording of the cover letter itself, however, indicates that the cover letter was outside the envelope. Specifically, the cover letter provides that "[e]nclosed in the envelope you will find a tape." Pl.'s SUF Ex. B-8 (Cover Letter). Additionally, the January 10, 1997 *New York Times* article published as a result of Defendant's disclosure demonstrates Defendant's knowledge of the tape's illegal origins. That article quotes Defendant as providing identical information as that contained in the letter, and even using similar phraseology. The cover letter provided that the envelope contains "a tape of a conversation heard December 21, 1996 at about 9:45 a.m.

[Q] Okay. And just so I'm clear, you can't remember seeing it on January 8th, when you met with the Martins, correct?

[A] Yes.

[Q] And at any time thereafter, did you see the cover letter?

[A] I have no recollection of seeing a letter.

Similarly, the same deposition at 154:14–19 reads as follows:

[Q] Okay. So you don't recall seeing the cover letter at any time prior to January 13th, just so I'm clear?

[A] Prior to January 13th.

[Q] 1997.

[A] No, I don't.

The call was a conference call heard over a scanner." *Id.* In comparison, the *New York Times* article states that

> [t]he Congressman said the tape was given to him on Wednesday by a couple who said they were from northern Florida. He quoted them as saying it had been recorded off a radio scanner, suggesting that one participant was using a cellular telephone. They said it was recorded about 9:45 a.m. on Dec. 21.

Pl.'s Ex. B-2. Defendant can explain neither the article quoting him as having knowledge of the tape's origins nor the remarkable similarity between the quotes attributed to him and the cover letter he purports not to remember reading. McDermott Dep. at 156–57.

Further, Defendant's conduct surrounding the publishing of this article also indicates that he was aware of the tape's illegal origins. By his own estimate, Defendant returned to his office and listened to the tape at approximately 7:00 p.m. on January 8, 1997. *See* McDermott Dep. at 162–64. Shortly thereafter that same night, Defendant called New York Times reporter Adam Clymer and invited him to Defendant's office to listen to the tape. *See id.* at 183–84. Clymer then wrote in the newspaper article that "a transcript [of the tape] was made available by a Democratic Congressman hostile to Mr. Gingrich who insisted that he not be identified further." Adam Clymer, *Gingrich is Heard Urging Tactics in Ethics Case*, N.Y. Times, Jan. 10, 1997, at A1, A20 (found at Pl.'s SUF Ex. B-2). McDermott continued to deny his role in the release of the tape when he spoke with reporters on January 10, 1997. *See* McDermott Dep. at 225–26. In fact, he maintained these denials until the Martins held a news conference on January 13, 1997 and identified him by name as the Democratic Congressman to whom they had given the tape. Def.'s Answer at 10. Consequently, on January 13, 1997, Defendant was forced to finally admit his true role in the tape's disclosure. Compl. ¶ 24; Answer at 10 (On "[t]hat same

day, after the Martin's news conference, defendant McDermott delivered a copy of the tape to the House Ethics Committee. Rep. Johnson, Chair of the Committee, immediately sent the tape to the United States Department of Justice. Defendant McDermott resigned from the Ethics Committee that same day."). Defendant's action of immediately inviting Clymer to listen to the tape is uncontested, and his subsequent attempts in the days following to conceal this disclosure reflects that McDermott knew he had obtained the tape improperly.

To counter all of these facts, Defendant relies primarily on faulty recollection as to crucial questions regarding what he knew and when he knew it. As to whether or not he read the cover letter, Defendant asserted only that "if I read it, I don't remember it." *Id.* at 150. Confronted with the newspaper article indicating that he told Clymer of the Martins' method of illegal intercept, Defendant responded, "I wouldn't say I didn't say it. I just don't recall it." *Id.* at 156. As to the portion of Clymer's article indicating that Defendant knew of the tape's illegal origin, Defendant explained that "[he does not] know how that got there [in the newspaper article] because [he does not] remember ever reading that." *Id.* at 157. Finally, when asked whether, as the newspaper article implies, the Martins related to him the manner in which they illegally obtained the tape, Defendant replied only that he does "not remember one way or another." *Id.*

Even though the Court has "assume[d] the truth of all statements proffered by the party [*i.e.*, McDermott] opposing summary judgment," *Greene v. Dalton*, 164 F.3d 671, 674 (D.C. Cir. 1999), all that is gained from this is an understanding that McDermott claims he cannot remember whether or not he saw the cover letter. Defendant's repeated reliance on faulty memory in the face of direct contrary evidence fails to create a genuine issue of material fact. *See, e.g., Federal Election Comm'n v. Toledano*, 317 F.3d 939, 950 (9th Cir. 2002) ([F]ailure to remember and lack of knowledge are not sufficient to

create a genuine dispute."); *FDIC v. Natl'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 205 F.3d 66, 75 (2d Cir. 2000) ("[V]ague denials and memory memory lapses . . . do not create genuine issues of material fact.")

The case at hand is distinguishable from *Bartnicki* on a very important point: In *Bartnicki*, defendant "Yocum . . . testified that he had found the tape in his mailbox shortly after the interception" and then later delivered the tape to radio commentator Vopper who, along with "other individuals and media representatives," published the contents of the conversation found on the tape. 532 U.S. at 519. In the instant case, however, McDermott actively accepted the tape from the people who had illegally recorded it. McDermott knew not only that he was receiving a tape from two strangers from Florida, *see* McDermott Dep. at 158, 171–72, but — as detailed in their cover letter — who those people were and how they had made the recording. In *Bartnicki*, the Supreme Court noted the importance of this when it wrote that "[i]n the Boehner case, as in this suit, a conversation over a car cell phone was intercepted, but in that case the defendant knew both who was responsible for intercepting the conversation and how they had done it." 532 U.S. at 522 n.5 (citation omitted). Moreover, McDermott played an essential role in the disclosure for which the Martins pleaded guilty and were fined. This is evident because the Martins first "attempted to give the tape to Congresswoman Karen Thurman [but] were advised by her to turn the tape directly over to [McDermott.]" Cover Letter (found at Pl.'s SUF Ex. B-8). Put simply, the Martins could not have completed their disclosure without the active assistance of McDermott, who joined in the Martin's violation of 18 U.S.C. § 2511(1)(c) by knowingly joining in the Martins's illegal actions.

In sum, all of the evidence is uncontradicted that at the time he took possession of the tape, Defendant was aware of the cover letter and, more importantly, knew of the Martin's illegal activity. In light of the discovery and

evidence now available to this Court at the summary judgment phase of the case, it is also uncontradicted that McDermott knew he was receiving a tape recording that had been illegally obtained. As a result, the Court finds that no genuine issue of fact arises as to Defendant's knowledge of the illegal transaction in which he was participating by accepting the tape from the Martins. The Court of Appeals's reasoning that flowed from this assertion thus continues to apply, and Defendant's claimed First Amendment defense fails in light of the applicable intermediate scrutiny. Therefore, Plaintiff is entitled to judgment as a matter of law with respect to Defendant's disclosure in violation of 18 U.S.C. § 2511(1)(c).

V. CONCLUSION

For the reasons stated above, the Court finds that the Florida statute is inapplicable and so Plaintiff's Motion for Summary Judgment is denied in part and Defendant's Motion for Summary Judgment is granted in part. As to the federal statute, however, the Court finds that because Defendant McDermott participated in an illegal transaction when he accepted the tape from the Martins, he is without First Amendment protection and Plaintiff Boehner is therefore entitled to judgment as a matter of law. To this extent, Plaintiff's Motion for Summary Judgment is granted in part and Defendant's Motion for Summary Judgment is denied in part.

Since the Court has found that Plaintiff is entitled to judgment as a matter of law with respect to Defendant's disclosure in violation of 18 U.S.C. § 2511(1)(c), the remaining question is one of damages. As discussed in the Order that accompanies this Opinion, the Court would benefit from limited additional briefing as to whether the Court should award Plaintiff any attorney's fees and costs, and whether an award of punitive damages is appropriate.

August 20, 2004

/s/
Thomas F. Hogan
Chief Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN A. BOEHNER,

Plaintiff,

v.

JAMES A. McDERMOTT,

Defendant.

Civ. No. 98-0594 (TFH)

ORDER

Pending before the Court are Plaintiff and Defendant's cross motions for summary judgment. For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that Defendant's Motion for Summary Judgment [# 67] is **GRANTED IN PART and DENIED IN PART**, and that Plaintiff's Motion for Summary Judgment [# 68] is **GRANTED IN PART and DENIED IN PART**. It is further

ORDERED that a status hearing shall occur on Thursday, September 16, 2004 at 3:00 p.m. to discuss the issues of damages, fees, and costs. The parties may each file a concise statement of their positions by 5:00 p.m. on Friday, September 10, 2004.

August 20, 2004

/s/
Thomas F. Hogan
Chief Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN A. BOEHNER,

Plaintiff,

v.

JAMES A. McDERMOTT,

Defendant.

Civ. No. 98-0594 (TFH)

MEMORANDUM OPINION

Upon consideration of the oral argument at the hearing on October 7, 2004, Plaintiff John A. Boehner's Statement of Position on Damages, Fees, and Costs ("Pl.'s SPD"), and Defendant James A. McDermott's Statement Regarding Punitive Damages, Attorney's Fees, and Costs ("Def.'s SPD"), and the entire record herein, the Court hereby awards Plaintiff $10,000 in statutory damages, $50,000 in punitive damages, and a reasonable attorney's fee and other litigation costs reasonably incurred.

I. BACKGROUND

This case results from a disclosure made by Defendant James McDermott to members of the press concerning an illegal intercept of a conference call between Plaintiff John Boehner and several House Republican leaders. McDermott is a Democratic member of the House of Representatives, representing the Seventh District of Washington, and Boehner is a Republican member of the House of Representatives, representing the Eighth District of Ohio. The subject of the conversation was a discussion of potential responses to the House Ethics Committee Probe of then-House Speaker Newt Gingrich. Boehner Dep. at 15–16.

Boehner participated in the conference call on a cellular phone inside his car while parked at a Waffle

House restaurant in northern Florida. Boehner Dep. at 9. The conference call was electronically intercepted by a Florida couple, Alice and John Martin, using a radio scanner. Def.'s Ans. ¶ 8. The Martins recorded the call and then delivered that tape to the Gainesville, Florida office of Democratic Representative Karen Thurman, who at the time represented the Fifth District of Florida. *See id.* ¶ 10. Representative Thurman advised the Martins to deliver the tape to Defendant, who was then a ranking Democratic member of the House Committee on Standards of Official Conduct ("House Ethics Committee"). *See* Cover letter of 1/8/1997 that the Martins presented to Defendant along with the tape (hereinafter "Cover Letter") (found at Pl.'s Statement of Undisputed Facts ("SUF") Ex. B-8).

On January 8, 1997, the Martins personally delivered a copy of the tape enclosed in an envelope to McDermott in the anteroom of the House Ethics Committee in Washington, D.C. McDermott Dep. at 157–58. Along with the tape was a letter explaining that the tape contained "a conference call heard over a scanner," and that "[the Martins] understand that [the Martins] will be granted immunity." Pl.'s SUF Ex. B-8 (Cover Letter). Before this encounter, McDermott claims to have had no knowledge of either the Martins or the tape. *See* McDermott Decl. ¶ 3 (found at Def.'s Opp'n Ex. F). McDermott later that evening returned to his office, opened the envelope, and listened to the tape. McDermott Dep. at 162. He maintains, however, that he has no recollection of seeing the accompanying letter at any time prior to his disclosure. *Id.* at 150.

That evening and the following day, McDermott disclosed the tape to the *New York Times* and the *Atlanta Journal-Constitution*. *Id.* at 174–75. The *New York Times* published a story regarding the contents of the disclosed tape on the front page of its January 10, 1997 edition. Adam Clymer, *Gingrich is Heard Urging Tactics in Ethics Case*, N.Y. Times, Jan. 10, 1997, at A1 (found at Pl.'s SUF Ex. B-2). The article references only an

anonymous Congressional source, but McDermott acknowledges that he was the source. McDermott Dep. at 220–21. At a press conference on January 13, 1997, the Martins declared that they were responsible for intercepting Plaintiff's conversation and identified McDermott as the person to whom they delivered a copy of the conversation. Def.'s Ans. ¶ 24. Only after the Martins' press conference did McDermott deliver copies of the conversation to other members of the House Ethics Committee. *Id.* ¶ 25. McDermott resigned from the committee the same day. *Id.*

II. PROCEDURAL HISTORY

Plaintiff filed a complaint on March 9, 1998 alleging that Defendant knowingly disclosed an unlawfully intercepted communication in violation of the federal wiretapping statue, *18 U.S.C. §2511(1)(c)*,[1] and a Florida wiretapping statue, *Fla. Stat. § 934.03(1)(c)*.[2] Plaintiff sought recovery for damages under *18 U.S.C. § 2520* and *Fla. Stat. § 934.10* that authorize private actions to recover for violations of the federal and state wiretapping statutes, respectively. This Court granted Defendant's motion to dismiss, finding that the First Amendment protected the

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[1] 18 U.S.C. § 2511 provides, in pertinent part, that (1) Except as otherwise specifically provided in this chapter any person who-

. . . .

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

. . . .

shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

[2] *Fla. Stat. § 934.03(1)(c)* provides substantively identical language as *18 U.S.C. § 2511(1)(c)*.

disclosure of lawfully obtained information. *Boehner v. McDermott*, No. CIV. 98-594, *1998 WL 436897, *7 (*D.D.C. July 28, 1998), *rev'd, 191 F.3d 463 (D.C. Cir. 1999).* The United States Court of Appeals for the District of Columbia reversed this Court by distinguishing McDermott's conduct from the controlling precedent in *Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989) ("If a newspaper lawfully obtains truthful information about a matter of public significance, then [the government] may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.") (quoting *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979))). *See Boehner v. McDermott*, 191 F.3d 463, 470–76 (D.C. Cir. 1999), vacated by 532 U.S. 1050 (2001). The Court of Appeals found that the federal and state wiretapping statutes were not unconstitutional as applied to McDermott. *Boehner*, 191 F.3d at 478. The Supreme Court granted certiorari, vacated the judgment of the Court of Appeals, and remanded the case in light of its decision in *Bartnicki v. Vopper*, 532 U.S. 514 (2001). *McDermott v. Boehner*, 532 U.S. 1050 (2001). On remand from the Supreme Court, the Court of Appeals reversed this Court's dismissal of the case and remanded, stating "[w]e also conclude that we would benefit from having the district court pass upon the arguments that have taken on new-found importance after *Bartnicki*." *Boehner v. McDermott*, 22 Fed. Appx. 16, No. 98-7156, 2001 WL 1699420 (D.C. Cir. 2001).

On February 22, 2002, Plaintiff amended his complaint to conform to *Bartnicki*, in light of the Court of Appeals suggestion on remand that it believed "the constitutional issues may more readily be decided if Boehner is given an opportunity to amend his complaint, which he is free to do under FRCP 15(a) because McDermott has not yet filed an answer to the complaint." *Id.* Defendant filed his Answer on April 12, 2002, and amended his answer on December 2, 2002.

Plaintiff filed a motion for summary judgment on Dec. 16, 2002. In that motion, Plaintiff claimed that Defendant's knowledge that the tape was illegally intercepted and his subsequent disclosure of the tape to members of the press "triggers liability for both statutory and punitive damages." Pl.'s Mot. at 5. Defendant also filed a motion for summary judgment on Dec. 16, 2002, asserting that because the facts in the instant case are indistinguishable from *Bartnicki*, his disclosure was protected by the First Amendment. Def.'s Mot. at 12–13. Defendant also claims that the Florida statute does not apply to a disclosure that occurred entirely outside of Florida. *Id.* at 12. In its August 20, 2004 Memorandum Opinion and Order, this Court found that the Florida statute was inapplicable and therefore denied Plaintiff's motion for summary judgment in part and granted Defendant's motion for summary judgment in part. Mem. Op. at 35. As to the federal statute, however, the Court found that because Defendant participated in an illegal transaction when he accepted the tape from the Martins, he was without First Amendment protection and Plaintiff was therefore entitled to judgment as a matter of law. To this extent, Plaintiff's motion for summary judgment was granted in part and Defendant's motion for summary judgment was denied in part. *Id.*

III. DAMAGES

Since the Court has found that Plaintiff is entitled to judgment as a matter of law with respect to Defendant's disclosure in violation of 18 U.S.C. § 2511(1)(c), the remaining question is one of damages. Under the remedies provision of the federal wiretapping statute, courts have the broad authority to award such relief "as may be appropriate." 18 U.S.C. § 2520(a).[3] Plaintiff

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[3] 18 U.S.C. § 2520 provides, in relevant part:

(a) In general. -- Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used

argues that he should be awarded his attorney's fees and costs, and punitive damages of at least $100,000, in addition to statutory damages of $10,000. Defendant urges the Court not to award Plaintiff any type of relief.

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in violation of this chapter may in a civil action recover from the person or entity, other than the United

States, which engaged in that violation such relief as may be appropriate.

(b) Relief. -- In an action under this section, appropriate relief includes-

(1) such preliminary and other equitable or declaratory relief as may be appropriate;

(2) damages under subsection (c) and punitive damages in appropriate cases; and

(3) a reasonable attorney's fee and other litigation costs reasonably incurred.

(c) Computation of damages --

. . . .

(2) In any other action under this section, the court may assess as damages whichever is the greater of-

(A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or

(B) statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000.

IV. DISCUSSION

A. Attorney's Fees and Litigation Costs

The remedies section of the federal wiretapping statute provides for the recovery of such relief as may be appropriate for a violation of the statute. 18 U.S.C. § 520(a). The statute then defines "appropriate relief" as including "a reasonable attorney's fee and other litigation costs reasonably incurred." *Id.* at § 2520(b)(3). Plaintiff is entitled to such an award in this case.

Plaintiff argues that the award of attorney's fees to a prevailing plaintiff is mandatory under the statute. Pl.' SPD at 3. Plaintiff supports his position by directing the Court to a plain reading of the statutory language according to basic canons of statutory construction. *Id.* at 2-5. The statute defines reasonable fees and costs as "appropriate" relief without further qualification. 18 U.S.C. § 2520(b)(3). By contrast, the other examples of "appropriate relief" enumerated by the statute are further qualified by language indicating they should only be awarded "as may be appropriate" or "in appropriate cases." *Id.* at § 2520(b)(1-2). Plaintiff argues that in order to give meaning to this distinction in the statutory language, as well as to prevent any redundancy in its reading, the provision must be interpreted as creating a mandatory award of attorney's fees and costs, while leaving the other types of relief to the discretion of the court to award on a case by case basis. Pl.'s SPD at 3. Further, Plaintiff argues that the Fourth Circuit has held that an attorney's fee award is mandatory under the Act. *See Abraham v. County of Greenville, SC*, 237 F.3d 386, 393 (4th Cir. 2001).

Defendant contends that under a plain reading of the statute, courts are given the discretion to decline to award damages of any type, including attorney's fees and costs. Def.'s SPD at 2. Defendant cites two Eighth Circuit cases for the proposition that the fee award is discretionary. *See Morford v. City of Omaha*, 98 F.3d 398, 401 (8th Cir. 1996) (affirming denial of damages,

fees, and costs); *Reynolds v. Spears*, 93 F.3d 428, 436 (8th Cir. 1996) ("We hold that the District Court did not err in holding that attorney fees and costs were not 'appropriate relief' in this case."(quoting district court opinion)). Defendant also cites *Shaver v. Shaver*, which found that "the plain meaning of the word 'may' as used in § 2520(a) gives [the court] discretion not to award costs and attorney's fees," 799 F. Supp. 576, 581 (E.D.N.C. 1992). Plaintiff argues that *Shaver* was overruled by the Fourth Circuit's subsequent holding that a "prevailing party is *entitled* to reasonable attorneys' fees under the Act." *Abraham*, 237 F.3d at 393 (emphasis added). Neither Plaintiff nor Defendant has pointed the Court to any authority in this circuit that explores the issue of whether an attorney's fee award is mandatory or to be left to the discretion of the trial court.

Even if the award of attorney's fees and costs is not mandatory under the remedies provision of the federal wiretapping statute, such relief is certainly at least routinely awarded by courts. Indeed, Plaintiff cites a "legion" of cases that have done so.[4] Pl.'s SPD at 3.

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[4] *E.g.*, *Abraham*, 237 F.3d at 393; *Desilets v. Wal-Mart Stores*, 171 F.3d 711, 717 (1st Cir. 1999); *Andrews v. Mullens*, 124 F.3d 210 (Table), 1997 WL 572198, *2 (9th Cir. 1997); *Williams v. Poulos*, 54 F.3d 764 (Table), 1995 WL 281451 (1st Cir. May 12, 1995); *Heggy v. Heggy*, 944 F.2d 1537, 1540-41 (10th Cir. 1991); *DirecTV v. Hedger*, 322 F. Supp. 2d 879, 883 (W.D. Mich. 2004); *Schmidt v. Devino*, 206 F. Supp. 2d 310, 314-15 (D. Conn. 2001); *Hilt v. Hurd*, 2001 WL 1517041, *3 (W.D. Va. Nov. 21, 2001); *Gaubert v. Gaubert*, 1999 WL 10384, *2 (E.D. La. Jan. 7, 1999); *Smoot v. United Transp. Union*, 1998 WL 689878 (N.D. Ohio Aug. 7, 1998), *aff'd in part & rev'd in part on other grounds*, 246 F.3d 633 (6th Cir. 2000); *Romano v. Terdik*, 939 F. Supp. 144, 150 (D. Conn. 1996); *Menda Biton v. Menda*, 812 F. Supp. 283, 28586 (D.P.R. 1993); *Deal v. Spears*, 780 F. Supp. 618, 625 (W.D. Ark. 1991), *aff'd*, 980 F.2d 1153 (8th Cir. 1992).

Whether or not the award of a reasonable attorney's fee and costs is mandatory under the federal wiretapping statute need not be decided here. In the instant case, such an award is appropriate. The purpose of the attorney's fee award is to encourage private litigation, as it is the most viable means of enforcing the statute, and to vindicate the right of the prevailing plaintiff to bring the lawsuit.[5]

Defendant puts forward several arguments as to why Plaintiff should not be awarded attorney's fees and costs: (1) Defendant had a good faith belief that his actions were protected by the First Amendment; (2) Defendant's conduct was limited in that his only role was to disclose the tape to the media; (3) Plaintiff has suffered no loss from the disclosure; (4) Plaintiff actually sought to benefit from the disclosure by identifying himself as one of the participants on the tape; and (5) the case was close on the merits. Def.'s SPD at 1-2. However, these arguments address Defendant's culpability and are relevant to the issues of compensatory and punitive damages, not attorney's fees, the purpose of which is neither to address Plaintiff's actual loss nor punish Defendant. As stated earlier, the purpose of awarding attorney's fees is to encourage private enforcement of the statute's prohibitions. Defendant has not articulated any reason why this purpose would not be served by an award of

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[5] In reference to Congress' provision of fee awards for claims under the Civil Rights Act of 1964, the Supreme Court has explained that the provision was meant to encourage lawsuits because, "it was evident that enforcement [of the statute] would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law." *Newman v. Piggie Park Enters.*, 390 U.S. 400, 401 (1968) (footnote omitted). The same reasoning applies to attorney's fee awards under the federal wiretapping statute.

attorney's fees and costs in this case.[6] Plaintiff shall recover a reasonable attorney's fee and other litigation costs reasonably incurred.

B. Determination of Attorney's Fees and Costs

The amount of attorney's fees and costs that Plaintiff is entitled to recover shall be established through post-judgment proceedings. Fed. R. Civ. P. 54(d)(2). The determination of attorneys' fees shall proceed in accordance with Local Civil Rule 54.2. The determination of the fee amount shall be held in abeyance pending the outcome of any appeal on liability by Defendant. LCvR 54.2(b).

C. Statutory Damages

Plaintiff shall be awarded statutory damages of $10,000. The remedies provision of the federal wiretapping statute states that in an action such as the instant case, the Court "may assess as damages whichever is the greater of--(A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or (B) statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000." 18 U.S.C. § 2520(c)(2). Plaintiff requests the $10,000 in liquidated damages

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[6] The cases Defendant cites in which plaintiffs were denied fee awards are all distinguished from the instant case. *See Morford*, 98 F.3d at 401 (affirming denial of fees and costs given plaintiff's lack of success on her claim in that she had been denied statutory and punitive damages even though a jury had found that defendant violated the statute); *Reynolds*, 93 F.3d at 436 (affirming denial of fees and costs where litigation was conducted by essentially the same counsel as were involved in a favorable judgment one month earlier and such piecemeal litigation could have been easily avoided); *Shaver*, 799 F. Supp. at 581 (denying fees and costs where defendant was judgment-proof). In the instant case, Plaintiff has been successful on his claim, the litigation is not duplicative, and Defendant is not judgment-proof

provided by the statute in lieu of actual damages. Pl.'s SPD at 8.

The Sixth Circuit has laid out a framework for determining a proper award under 18 U.S.C. § 2520(c)(2) that is useful here:

> (1) The court should first determine the amount of actual damages to the plaintiff plus the profits derived by the violator, if any. *See* 18 U.S.C. § 2520(c)(2)(A).
>
> (2) The court should next ascertain the number of days that the statute was violated, and multiply by $100. *See* 18 U.S.C. § 2520(c)(2)(B).
>
> (3) The court should then tentatively award the plaintiff the greater of the above two amounts, unless each is less than $10,000, in which case $10,000 is to be the presumed award. *See id.*
>
> (4) Finally, the court should exercise its discretion to determine whether the plaintiff should receive any damages at all in the case before it. *See* 18 U.S.C. § 2520(c)(2).

Dorris v. Absher, 179 F.3d 420, 430 (6th Cir. 1999). First, in the instant case, there has been no evidence as to the amount of actual damages to Plaintiff or profits derived by Defendant, if any. Second, the violation occurred over no more than two days.[7] Because there is no evidence of actual damages and only $200 in per diem damages at most, and because each of these amounts is less than $10,000, the latter figure is the proper sum to award Plaintiff.

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7 Arguably, since there were two distinct disclosures made on two separate days to separate newspapers, the violation could be construed as occurring over two days. *See* McDermott Dep. at 174-75.

As was the case with the award of fees and costs, the parties again argue over whether the imposition of statutory damages is mandatory or discretionary under the remedies provision of the federal wiretapping statute.[8] Like attorney's fees, statutory damages are routinely awarded if not mandatory under the statute. *See generally* cases cited in note 4, *supra*. Again, whether or not statutory damages are discretionary need not be decided here, since the Court finds that statutory damages are appropriate in this case.

Defendant argues that statutory damages are inappropriate because there has been no evidence of financial gain to him or loss to Plaintiff, and because Defendant's actions were motivated by a good faith belief that he was acting in the public interest and under First Amendment protection. Def.'s Opp'n to Pl.'s Mot. for Summ. J. ("Def.'s Opp'n") at 32-33. Plaintiff correctly points out that the purpose of statutory damages is to provide for recovery without a specific showing of damages, in recognition of the fact that prohibited invasions of privacy are inherently damaging. Pl.'s Reply at 18. Plaintiff also argues that Defendant cannot avoid damages by raising an unsuccessful First Amendment defense, especially given that Defendant made the

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[8] While the circuits have split over this issue, it does appear that the majority of federal courts interpreting the remedies section of the federal wiretapping statute have found that district courts have the discretion to refuse to award damages in an appropriate situation. *See Absher*, 179 F. at 429-30; *Reynolds*, 93 F.3d at 435; *Nalley v. Nalley*, 53 F.3d 649, 653 (4th Cir. 1995); *Schmidt v. Devino*, 206 F. Supp.2d 301, 306-07 (D. Conn. 2001); *Goodspeed v. Harman*, 39 F. Supp.2d 787, 791 (N.D. Tex. 1999); *Romero v. Terdik*, 939 F. Supp. 144, 149 (D. Conn. 1996); *Shaver*, 799 F. Supp. at 580; but *see Rodgers v. Wood*, 910 F.2d 444, 448 (7th Cir. 1990) (determining, in a split decision, that Congress did not intend to grant discretion to a trial court to refuse to award statutory damages).

prohibited disclosure without first researching the legality of his actions. *Id.* at 20.

Defendant relies heavily on the *Reynolds* decision, and attempts to align himself with the defendant in that case, arguing that like the defendant in *Reynolds*, he "had an understandable motivation in trying to expose what he believed to be wrongful conduct by others." Def.'s Opp'n at 32. However, it was not the defendant's motivation, but his good faith belief in the legality of his conduct that was the court's focus in that case. *Reynolds*, 93 F.3d at 436. In that case, the defendant tapped the phone line in his own store in an attempt to uncover suspected misconduct by his employees after having been incorrectly advised by a law enforcement official that tapping one's own phone line would be legal. *Id.* In the instant case, Defendant did not consult any authority on the legality of his disclosures prior to making them. Additionally, he does not argue that he thought the disclosures were permissible under the federal wiretapping statute, but that he believed the statute was unconstitutional as applied to him. *See* Def.'s SPD at 3-7. Defendant simply does not start out on the same innocent footing as the *Reynolds* defendant.

Further, there were several other circumstances in *Reynolds* that mitigated against the imposition of statutory damages, 93 F.3d at 436. First, there was no evidence of widespread disclosure or use of the plaintiffs' intercepted conversations in that case, unlike here, where the disclosure was made to two major newspapers and disseminated nationally. *See id.* Second, the defendants in *Reynolds* had already received substantial civil penalties for the same conduct in a previous litigation, unlike here, where Defendant is only exposed to liability for damages based on his conduct in the instant case. *See id.* Finally, in *Reynolds*, the court was also persuaded by the financial circumstances of the defendants, who were elderly and retired with a fixed income. *Id.* Here, Defendant has made no such claim of impecuniousness.

The remaining cases cited by Defendant in which statutory damages were denied are domestic relations cases that involved circumstances that were similar to those in *Reynolds*, but are not present here. *See Culbertson v. Culbertson*, 143 F.3d 825, 827 (4th Cir. 1998) (relying on "de minimis" violation); *Nalley*, 53 F.3d at 654-55 (relying on "de minimis" violation in that defendant disclosed anonymously delivered tape only to relevant family members and her attorney); *Shaver*, 799 F. Supp. at 580 (relying on factors of "de minimis" violation given defendant's good faith belief in the legality of her actions in tapping her own phone line, and financial circumstances of the defendant).

In the instant case, where Defendant knowingly participated in an illegal transaction in accepting the tape, subsequently caused the intercepted conversation to be widely disseminated, and is not under any financial circumstances that would make an award futile, the award of statutory damages is appropriate, and the Plaintiff is entitled to recover $10,000 in statutory damages in this case.

D. Punitive Damages

The Court finds that an award of punitive damages in the amount of $50,000 is appropriate given Defendant's outrageous conduct in this case.

In a proceeding under the federal wiretapping statute, in order to receive punitive damages, the plaintiff must "'show that defendants acted wantonly, recklessly, or maliciously.'" *Quigley v. Rosenthal*, 327 F.3d 1044, 1068 (10th Cir. 2003) (citing cases), *cert. denied*, 124 S. Ct. 1507 (2004), *accord Smith v. Wade*, 461 U.S. 30, 56 (1983); *Samaritan Inns, Inc. v. District of Columbia*, 114 F.3d 1227, 1239 (D.C. Cir. 1997). Both Plaintiff and Defendant agree that this is the appropriate standard for determining whether punitive damages are appropriate. *See* Pl.'s SPD at 9; Def.'s SPD at 3. Plaintiff argues that Defendant's actions were both malicious and reckless. Pl.'s SPD at 9. Defendant argues that an award of

punitive damages is inappropriate because his conduct was limited in scope in that his only role was to share the tape with the news media, because he honestly believed that he was acting in the public interest by exposing official misconduct, and because the case was close on the merits.[9] Def.'s SPD at 1-2.

The Court finds that Defendant's conduct was malicious in that he intentionally disclosed the tape to the national media in an attempt to politically harm the participants through an invasion of their privacy. Defendant knowingly participated in an illegal transaction when he accepted the tape from the Martins. Mem. Op. at 34. He then intentionally disclosed the Martins' tape to major newspapers to be disseminated nationally. McDermott Dep. at 174-75. Defendant's argument that he is less culpable because his role was limited to the tape's disclosure is disingenuous. It was precisely the disclosure to the national media and resulting widespread dissemination of the conversation that was the greatest invasion of Plaintiff's privacy. *See Bartnicki*, 532 U.S. at 533 ("[T]he disclosure of the contents of a private conversation can be an even greater intrusion of privacy than the interception itself.").

Further, despite his assertions to the contrary, the Court finds that Defendant's motives were not benign. Defendant's intention was to embarrass and politically

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[9] Defendant's remaining two arguments as to why punitive damages are inappropriate (because no wrongful gain or loss resulted from the disclosure and because Plaintiff brought the public exposure on himself) can be disposed of summarily as they miss the point of punitive damages, which is not to compensate the plaintiff for actual damages suffered or reflect the plaintiff's relative culpability. The purpose of a punitive damages award is to punish and deter illegal conduct, and to exact retribution on behalf of society for the violation of its laws. *See e.g. State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003).

harm the individuals overheard on the tape, as evidenced by the Adam Clymer article that initially reported on the tape. *See* Pl.'s SUF Ex. B-2. The article stated that Defendant indicated to Clymer that his disclosure was motivated by hostility toward Newt Gingrich, one of the intercepted conversation's participants. *Id.* Defendant's political motivations are further demonstrated by several of the fundraising materials he distributed touting the disclosure, which depict Mr. Gingrich as "red-handed and red-faced." Pl.'s SUF Ex. L, at M 000014-15. Defendant's argument that he was acting in the public interest by exposing official misconduct is unsupported by the evidence. The facts in this case reveal that Defendant could not have intended to expose misconduct, since he there is no evidence that he was aware of any at the time he made the disclosure. *See* Pl.'s SPD at 11. Judge Sentelle agreed, stating:

> He obtained these communications not for the purpose of disclosing the felonies or assisting in the enforcement of law, but solely for the purpose of using the contents of the communications in the pursuit of the politics of personal destruction. To compound the wrong, this was not just any congressman, but the co-chair of the House Ethics Committee. In other words, a public official charged with the oversight of the ethics of his colleagues willfully dealt with felons and knowingly received unlawfully obtained evidence on the chance that he might be able to use something contained therein to embarrass one of the colleagues whose ethics he was charged with policing.

Boehner v. McDermott, 191 F.3d at 481 (Sentelle, J. dissenting). Defendant's willful and knowing misconduct rises to the level of malice in this case.

Additionally, Plaintiff has shown that Defendant acted recklessly. Plaintiff argues that Defendant's conduct was reckless in that he acted without consulting

any authority on the legality of disclosing the tape, instead relying solely on his own "uninformed guesses" that he was shielded by the First Amendment. Pl.'s SPD at 13. Defendant maintains that he acted under a good faith belief that his disclosure was protected speech. Def.'s SPD at 3. Evidence that a defendant believed he was acting lawfully is one factor to consider in determining whether he acted with the sufficient state of mind to make the award of punitive damages appropriate. *See Quigley*, 327 F.3d at 1070. In *Quigley*, an award of $7.5 million in punitive damages was affirmed based on circumstances similar to the instant case. *Id.* at 1068-71. The defendants in *Quigley*, like Defendant McDermott in this case, disclosed illegally intercepted conversations in an attempt to portray the plaintiffs in a negative light. *Id.* at 1044. Additionally, the court refused to credit the defendants' asserted good faith belief in the legality of their conduct. The court found that had the defendants, who were lawyers, researched the issue, they would have discovered that their intended use of the calls was illegal. Their failure to do so was reckless and punitive damages were warranted. *Id.* at 1070.

As in *Quigley*, Defendant's asserted good faith belief in the legality of his conduct cannot be credited. First, he knowingly participated in an illegal transaction by accepting the tape from the Martins. Second, his position is not that he did not know that his disclosure violated the federal wiretapping statute, but that he believed that by cloaking himself in the First Amendment, he essentially had an affirmative defense to the violation.[10]

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[10] Defendant's asserted corollary to this argument that punitive damages are inappropriate because the case was close on the merits of this issue is wrong. The fact that this case turned out to be close on the merits would only be relevant if Defendant had attempted to discern the constitutionality issue prior to his disclosures, and came to the incorrect conclusion

In addition to this notion being less than credible,[11] Defendant's reliance upon it without consulting any legal authority whatsoever was reckless.

Since Plaintiff has shown that Defendant's actions were both malicious and reckless, an award of punitive damages is appropriate in this case, and Plaintiff shall be awarded $50,000.

V. CONCLUSION

For the reasons stated above, the Court finds that an award of both statutory and punitive damages is appropriate in this case. Plaintiff shall be awarded statutory damages in the amount of $10,000, and punitive damages in the amount of $50,000. Further, Plaintiff shall be awarded his reasonable attorney's fees and other litigation costs reasonably incurred. As discussed in the Order that accompanies this Opinion, the amount of attorney's fees and costs that Plaintiff is entitled to recover shall be established through post-judgment proceedings. Fed. R. Civ. P. 54(d)(2). The determination of attorneys' fees shall proceed in

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that such disclosures would be protected. The evidence reveals that Defendant made no such effort.

[11] As Plaintiff points out, this belief would require a United States Congressman to assume that a statute enacted by Congress is unconstitutional. Pl.'s SPD at 14.

accordance with Local Civil Rule 54.2. The determination of the fee amount shall be held in abeyance pending the outcome of any appeal on liability by Defendant. LCvR 54.2(b).

October 22, 2004

/s

Thomas F. Hogan
Chief Judge

ADOPTED BY THE COMMITTEE ON STANDARDS OF OFFICIAL CONDUCT ON DECEMBER 8, 2006

109th CONGRESS, 2nd SESSION

U.S. HOUSE OF REPRESENTATIVES

COMMITTEE ON STANDARDS OF OFFICIAL CONDUCT

IN THE MATTER OF REPRESENTATIVE JAMES McDERMOTT

DECEMBER 6, 2006

Mrs. BIGGERT from the Investigative Subcommittee submitted the following

REPORT

To the Committee on Standards of Official Conduct.

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Stan P. Simpson, Counsel to the Investigative Subcommittee

I. INTRODUCTION

On November 16, 2004, Representative David L. Hobson filed a complaint alleging that Representative James McDermott violated certain laws, rules and standards of conduct in disclosing to the news media the contents of an intercepted telephone conversation in January 1997. The intercepted telephone conversation related to proceedings of the Committee on Standards of Official Conduct (the "Committee") regarding Representative Newt Gingrich, who was a Member of the House at that time. Until mid-January 1997, Representative McDermott served as Ranking Minority Member of the House Select Committee on Ethics, which had been created at the beginning of the 105th Congress for the sole purpose of completing action on the aforementioned matter involving Representative Gingrich.

On December 28, 2004, the Chairman and Ranking Minority Member of the Committee jointly determined to establish an Investigative Subcommittee and to forward portions of Representative Hobson's complaint to that body. The Investigative Subcommittee was charged with conducting an inquiry on allegations that Representative McDermott's conduct violated the House Code of Official Conduct (clause 1 of which provides that Members and staff shall conduct themselves "at all times in a manner which shall reflect creditably on the House of Representatives"), provisions of the Code of Ethics for Government Service, the Committee member non-disclosure agreement, or the Committee confidentiality rules.

On March 20, 2006, the Committee voted to carry over this matter regarding Representative McDermott to the 109th Congress.

A summary and explanation of the Investigative Subcommittee's findings are set forth in this Report.

II. SUMMARY OF EVENTS AND FACTUAL FINDINGS

A. Committee Proceedings Involving Former Representative Newt Gingrich

The relevant Committee proceedings involving former Representative Newt Gingrich are summarized in the Report of the Select Committee on Ethics to the House entitled "In the Matter of Representative Newt Gingrich," and an additional Committee publication entitled "Sanction Hearing and Related Materials."[1] As summarized in those materials, the matter involving Representative Gingrich was initiated during the 103rd Congress following a complaint filed with the Committee on September 7, 1994 by Ben Jones. Mr. Jones was Representative Gingrich's opponent in his 1994 campaign for reelection, and his complaint was filed in accordance with Committee and House rules at that time that permitted formal complaints to be filed by persons other than Members of the House.[2] The focus of Mr. Jones' complaint was a course taught by Representative Gingrich called "Renewing American Civilization."[3] The complaint alleged that Representative Gingrich used his congressional staff to work on the course, and that Representative Gingrich created the course under the

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[1] *See In the Matter of Representative Newt Gingrich*, H. Rep. 105-1, 105th Cong., 1st Sess. (Jan. 17, 1997) *("Rep. Gingrich Report"); Sanction and Related Materials, Hearing Before the Select Committee on Ethics*, 105th Cong. 1st Sess. (Comm. Print Jan. 17, 1997) *("Rep. Gingrich Hearing Materials").*

[2] *Rep. Gingrich Report* at 1; Committee on Standards of Official Conduct ("Committee") Rule 14 (103rd Congress). Mr. Jones was a former Member of the House at the time he filed his complaint. Mr. Jones served in the House during the 101st and 102nd Congresses (1989 to 1993).

[3] *Rep. Gingrich Report* at 1.

sponsorship of Section 501(c)(3) organizations "to meet certain political, not educational, objectives," and by doing so caused a violation of Section 501(c)(3) of the Internal Revenue Code to occur.[4]

The matter was not resolved by the Committee before the end of the 103rd Congress, and on January 26, 1995, Representative David Bonior filed an amended version of the complaint previously filed by Mr. Jones.[5] On December 6, 1995, the Committee voted to initiate a "Preliminary Inquiry" into the allegations of misuse of tax-exempt organizations and appointed an investigative subcommittee (hereafter "Gingrich Subcommittee") to conduct the inquiry.[6] The Chairman of the Gingrich Subcommittee was Representative Porter J. Goss, and Representative Benjamin L. Cardin served as the Investigative Subcommittee's Ranking Minority Member. The other two Members of the subcommittee were Representative Steven Schiff and Representative Nancy Pelosi. The Committee also determined to appoint a Special Counsel to assist the Gingrich Subcommittee.

On September 26, 1996, the Gingrich Subcommittee announced that the investigation of Representative Gingrich was being expanded into several additional areas.[7] The subcommittee concluded its investigation work on December 12, 1996.[8] On December 15, 1006, the Gingrich Subcommittee and Representative Gingrich, through their respective counsel, initiated discussions towards resolving the matter without proceeding to a formal adjudicatory hearing in accordance with the rules

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[4] *Id.*

[5] *Id.*

[6] *Id.* at 1-2.

[7] The specific areas of expansion are set forth in *Rep. Gingrich Report* at 2.

[8] *Rep. Gingrich Report* at 3.

of the Committee at that time.[9] A negotiated resolution was reached by the parties, and on December 21, 1996, the Gingrich Subcommittee adopted a Statement of Alleged Violation describing conduct by Representative Gingrich which the subcommittee concluded violated then-House Rule 43, Clause 1 of the Rules of the House of Representatives (current House Rule 23, Clause 1).[10] On that same date, Representative Gingrich executed an Answer admitting to the Statement of Alleged Violation.[11] The Statement of Alleged Violation adopted by the Gingrich Subcommittee and Representative Gingrich's Answer were released publicly by the subcommittee on December 21, 1996.[12]

As part of the negotiated resolution of the matter, the subcommittee and Representative Gingrich agreed that "no public comment should be made about this matter while it is still pending. This includes having surrogates sent out to comment on the matter and attempt to mischaracterize it."[13] Further, beyond the press statements agreed to by the parties, "neither Mr. Gingrich nor any Member of the subcommittee may make any further public comment."[14] The agreement on this topic pertained to "press statements," and Members of the Gingrich Subcommittee and Representative Gingrich were free to engage in "private conversations with Members of Congress about these matters."[15]

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[9] *Id.* at 94.

[10] *Rep. Gingrich Hearing Materials* at 92.

[11] *Id.* at 91.

[12] *Id.* at 90.

[13] *Rep. Gingrich Report* at 95.

[14] *Id.* at 95.

[15] *Id.* at 95-96.

Due to the timing of the Gingrich Subcommittee's actions regarding Representative Gingrich, that body and the Committee were not able to formally present the subcommittee's findings and recommendations to the House in accordance with Committee rules prior to the conclusion of the 104th Congress. At the start of the 105th Congress on January 7, 1997, the House established a Select Committee on Ethics, and appointed as Members of that Committee all of the Members who were on the standing Committee on Standards of Official Conduct at the expiration of the 104th Congress. The Select Committee on Ethics was given jurisdiction by the House "only to resolve the Statement issued by the Investigative Subcommittee of the standing Committee on Standards of Official Conduct in the One Hundred Fourth Congress relating to the official conduct of Representative Gingrich of Georgia and otherwise report to the House on the activities of that investigative subcommittee."[16] The House further provided in the Rules of the House of Representatives for the 105th Congress that in the exercise of its jurisdiction, the Select Committee on Ethics "shall possess the same authority as, and shall conduct its proceedings under the same rules, terms, and conditions . . . as those applicable to the standing Committee on Standards of Official Conduct in the One Hundred Fourth Congress[.]"[17] The House Rules

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[16] House Rule 10, Clause 4(e)(3) (105th Congress) (as adopted in H. Res. 5 on January 7, 1997).

[17] *Id.; see also Rep. Gingrich Report* at 2. The House could have reestablished the Committee on Standards of Official Conduct as a standing committee at the start of the 105th Congress. However, it was determined during that time period that before reestablishing the Committee as a standing committee, the House needed to "reassess" its "standards process," and to empanel a bipartisan task force "to review the existing House standards process and recommend reforms of that process." *Report of the Ethics Reform Task Force on H. Res. 168*, 105th Cong., 1st Sess. (Comm. Print June 17, 1997) at

also provided that "the select committee shall cease to exist upon final disposition by the House of a report designated by the select committee of its final report on the matter, or at the expiration of January 21, 1997, whichever is earlier."[18]

On January 17, 1997, the Select Committee on Ethics held a sanction hearing in the matter pursuant to then-Committee Rule 20. Following the hearing, the Select Committee on Ethics issued its report to the House, which recommended that Representative Gingrich be reprimanded and ordered to reimburse the House for costs associated with the Committee's investigation. On January 21, 1997, the House adopted the report of the Select Committee on Ethics *In the Matter of Representative Newt Gingrich*.[19] In a section of the report entitled "*Post-December 21, 1996 Activity*," the report disclosed that "[i]n the opinion of the Subcommittee Members and the Special Counsel, a number of the press accounts [following release of the Statement of Alleged Violation] indicated that Mr. Gingrich had violated the agreement concerning statements about the matter." Further, the report state that

> Mr. Gingrich's counsel was notified of the Subcommittee's concerns and the Subcommittee met to consider what action to

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1. In brief, interest had developed in the House in "reexamining ways to better ensure that the standards process in the House functions in a manner that is nonpartisan, efficient and fair." *Id.* In substantial measure, the current Committee on Standards of Official Conduct functions in accordance with the rules of procedure adopted by the House following the report and recommendations of the aforementioned bipartisan task force.

[18] House Rule 10, Clause 4(e)(3) (105th Congress) (as adopted in H. Res. 5 on January 7, 1997).

[19] *See* H. Res. 31, 105th Cong., 1st Sess. (Jan. 21, 1997).

> take in light of this apparent violation. The Subcommittee determined that it would not nullify the agreement. While there was serious concern about whether Mr. Gingrich had complied with the agreement, the Subcommittee was of the opinion that the best interests of the House still lay in resolving the matter without a disciplinary hearing and with the recommended sanction that its Members had previously determined was appropriate. However, Mr. Gingrich's counsel was informed that the Subcommittee believed a violation of the agreement had occurred and retained the right to withdraw from the agreement with appropriate notice to Mr. Gingrich.[20]

The report did not specify the conduct engaged in by Representative Gingrich that raised concerns with the Gingrich Subcommittee.

B. Conduct of Representative James McDermott

In the instant matter, the focus of the Investigative Subcommittee's inquiry involving Representative McDermott was on the disclosure by Representative McDermott to members of the news media of the contents of an illegally intercepted telephone conference. The conduct of Representative McDermott that is now under review occurred in January 1997 while he was the Ranking Minority Member of the House Select Committee on Ethics. As referenced below, in substantial measure, the factual conclusions made by the Investigative Subcommittee regarding Representative McDermott's conduct are based on admissions made by Representative McDermott during the course of ongoing federal court civil litigation with Representative John A. Boehner. Sources of the referenced admissions include transcribed sworn statements made during a civil deposition of

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[20] *Rep. Gingrich Report* at 96.

Representative McDermott during the litigation.[21] Key events in the civil litigation proceedings between Representative McDermott and Representative Boehner are described in a separate section in this Report.

The Investigative Subcommittee also requested and obtained materials from the Department of Justice related to that agency's investigation of this matter, and additionally subpoenaed documents from Representative McDermott. By letter dated July 19, 2006, Representative McDermott was invited by the Investigative Subcommittee to present a statement to the Investigative Subcommittee in accordance with Committee Rule 19(a)(3). Representative McDermott declined to make a statement in accordance with that rule.

Representative McDermott has been a Member of the House representing the Seventh District of Washington since 1989. Representative McDermott was Ranking Minority Member of the Committee on Standards of Official Conduct during the 104th Congress.[22] As such, he became Ranking Minority Member of the House Select Committee on Ethics on January 7, 1997, in accordance with House Rule 10, Clause 4(e)(3) (105th Congress) (as adopted in H. Res. 5 on January 7, 1997).

On December 21, 1996, two individuals, John Martin and Alice Martin, while near Lake City in Columbia County, Florida, used a scanner to intentionally intercept a wire communication in the form of a cellular telephone

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[21] Representative McDermott was deposed in the civil case on July 24, 2002 and December 12, 2002.

[22] Representative McDermott was Chairman of the Committee on Standards of Official Conduct during the 103rd Congress, and he also served as a Member of the Committee during the 102nd Congress.

call.[23] The intercepted telephone call was a conference call whose participants included Representative Gingrich, Representative Boehner and others.[24] The record indicates that Mr. and Mrs. Martin, while traveling, overheard a telephone conversation using a scanning device that was purchased at Radio Shack. They recognized some of the voices in the conversation. Mr. Martin, using a handheld tape recorder that was in his car, recorded the conversation.[25]

According to a *New York Times* article by Adam Clymer published on January 10, 1997 (discussed in more detail below), the participants in the telephone call recorded by the Martins included Representative Boehner, Representative Gingrich, Representative Richard Armey, Ed Bethune (a former Member of the House then serving as Representative Gingrich's lawyer), Ed Gillespie (reported in the *New York Times* article as

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[23] *See* Transcript of Sentencing Proceedings before the Honorable Harvey E. Schlesinger in *United States v. Alice Martin and John Martin*, (M.D. Fla. April 25, 1997) at 23. An investigation of the Martins' conduct was conducted by the Department of Justice, and, as reflected by the cited transcript of court proceedings, on April 25, 1997, John and Alice Martin pleaded guilty to violating 18 U.S.C. §§ 2511(1)(a) and 2511(4)(b)(ii), provisions of law which prohibit the intentional interception of the radio portion of a cellular telephone call. John and Alice Martin were each sentenced to pay a fine of $500. *Id.* at 52. A press statement of the Department of Justice dated April 23, 1997 regarding the investigation of the Martins states that "[b]ecause the interception involved the radio portion of a cellular telephone communication, and because there is no evidence that the interception was for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private financial gain, the U.S. Code classifies [the Martins'] offense as an infraction. The maximum penalty is a $5,000 fine." *See* Exhibit 1.

[24] *Id.* at 23.

[25] *Id.* at 38-39.

communications director of the Republican National Committee), Representative Bill Paxon, and Representative Tom DeLay.[26] Representative Boehner participated in the conference call on a cellular phone inside his car while parked outside a restaurant in northern Florida.[27] The subject of the telephone conference call, as far as can be gleaned from the *New York Times* article, was the content of statements that may be made publicly related to the inquiry of the Investigative Subcommittee involving Representative Gingrich.[28]

On January 8, 1997, Mr. and Mrs. Martin personally delivered a copy of a tape in an envelope to Representative McDermott in one of the rooms of the Committee on Standards of Official Conduct, which is located in Suite HT-2 in the United States Capitol Building.[29]

The record supports a finding that the tape the Martin delivered to Representative McDermott was accompanied by a letter to Representative McDermott. Representative McDermott testified in his deposition that he has no recollection of seeing a letter from the Martins at the time they delivered the tape to him, or whether the tape was accompanied by a letter.[30] A copy of a letter from the

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[26] *"Gingrich Is Heard Urging Tactics in Ethics Case," N.Y. Times* (Jan. 10, 1997) (Exhibit 2).

[27] Rep. Boehner Dep. at 9.

[28] *See* Exhibit 2. The Investigative Subcommittee does not have a copy of the tape at issue, nor a complete or verifiable transcript thereof. The last known location of the tape was the Department of Justice, which received it from Chairman Johnson of the House Select Committee on Ethics on or about January 13, 1997. *See* Exhibit 3.

[29] Rep. McDermott Dep. at 157-58.

[30] *Id.* at 150, 153.

Martins addressed to Representative McDermott was obtained by the Investigative Subcommittee from records filed in the United States District Court in connection with the *Boehner v. McDermott* civil litigation. The transcript of the deposition of Representative McDermott taken during the litigation indicates that Representative McDermott obtained a copy of the letter from the Department of Justice, and that Representative McDermott subsequently produced that copy of the letter to Representative Boehner during the discovery phase of the litigation.[31]

The letter, dated January 8, 1997, and addressed to "Jim McDermott, Ranking Member," contained the following text:

> Enclosed in the envelope you will find a tape of a conversation heard December 21, 1996 at about 9:45 a.m. The call was a conference call heard over a scanner. We felt the information included were [sic] of importance to the committee. We live in the 5th. [sic] Congressional District and attempted to give the tape to Congresswoman Karen Thurman. We were advised by her to turn the tape directly over to you. We also understand that we will be granted immunity.
>
> My husband and I work for Columbia County Schools in Columbia County Florida. We pray that committee [sic] will consider our sincerity in placing it in your hands.
>
> We will return to our home today.
>
> Thank you for your consideration.
>
> John and Alice Martin.[32]

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[31] *Id.* at 151.

[32] *See* Exhibit 4.

At his deposition, Representative McDermott described the circumstances of his receiving the tape from the Martins as follows:

> During a break of the Ethics Committee, I was standing in the anteroom by the door to the hallway and someone asked if I was Congressman McDermott and I said yes. And this couple came up to me and said they had, they wanted to give me something that they thought I would be interested in.
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> And I said, who are you? And they said John and whatever his wife's name Martin is. And I said where are you from? And they, I have, I mean there were eight or nine people standing around there and I don't remember exactly whether they told me they were from Karen Thurman's district or—I don't remember exactly. But they told me they were in North Florida and then he gave me a card, and I said thank you, I'll listen to it.[33]
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> It couldn't have been more than 30 seconds. I mean, I was just trying to get rid of them. Take whatever they had, whoever they were, put it in my pocket and go on with my business. Because I had enough on my mind at that point.[34]

Representative McDermott also described his encounter with the Martins in a separate declaration he executed on December 11, 2002 in connection with the *Boehner v. McDermott* litigation. Representative McDermott stated in that document that:

> On or about January 8, 1997, I was approached by a man and woman in the anteroom of the

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[33] Rep. McDermott Dep. at 157-158.

[34] *Id.* at 176.

> House of Ethics Committee. They asked me whether I was Congressman McDermott. After I acknowledged who I was, the man and woman identified themselves as Mr. and Mrs. Martin and handed me an envelope. The Martins said that the envelope contained a tape recording that they thought would be of interest to me and asked me to listen to it. I said that I would.
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> Until that encounter, neither I, nor my staff, nor anyone acting on my behalf had any knowledge of the Martins or their tape. I had no idea what the tape contained when the Martins handed it to me, because they never discussed its contents with me. I did not learn of the contents of the tape until I returned to my office later and listened to the tape. No one else was present when I listened to the tape.
>
> I have never had any communications with the Martins other than during that single encounter on or about January 8, 1997. I have never asked anyone to communicate with the Martins, directly or indirectly, at any time or for any reason. Neither I, nor my staff, nor anyone on my behalf, has ever talked about the subject of immunity with the Martins.[35]

Rep. McDermott estimated that he received the package containing the tape from the Martins at approximately 5:00 p.m.[36] He described the envelope as an "81/2 by 11 envelope," and the tape as "one of those little tiny tapes like you have in a hand-held recorder or a

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[35] Declaration of James A. McDermott dated December 11, 2002 (filed in *Boehner v. McDermott* civil litigation as Exhibit F to Rep. McDermott's Opposition to Rep. Boehner's Motion for Summary Judgment).

[36] Rep. McDermott Dep. at 160.

telephone answering machine."[37] He also testified that he was present at the offices of the Committee to participate in a Committee meeting related to the Committee's consideration of the matter involving Representative Gingrich.[38]

Representative McDermott returned to his personal office in the Rayburn House Office Building at approximately 7:00 p.m. and listened to the tape on a handheld tape recording device that he had in his office.[39] Representative McDermott recognized some of the voices on the tape, including those of Representative Gingrich and Representative Richard Armey.[40] Subsequent to listening to the tape, Representative McDermott contacted Jeanne Cummings of the *Atlanta Journal-Constitution* and left a voicemail for her.[41] Representative McDermott also contacted Adam Clymer of *New York Times* and invited him to Representative McDermott's office that evening. Mr. Clymer accepted Representative McDermott's invitation.[42] During their meeting, Representative McDermott played the tape he received from the Martins for Mr. Clymer and he permitted Mr. Clymer to make a recording of the tape.[43]

Ms. Cummings of the *Atlanta Journal-Constitution* returned Representative McDermott's telephone call the

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[37] *Id.* at 159.

[38] *Id.* at 160.

[39] *Id.* at 162, 163.

[40] Response of Rep. McDermott to Rep. Boehner's Statement of Undisputed Facts in Support of His Motion For Summary Judgment (hereafter "Rep. McDermott Response to SUF") at ¶ 18.

[41] *Id.* at ¶ 21.

[42] Rep. McDermott Dep. at 183-84.

[43] *Id.* at 186-187.

next morning and subsequently came to his office in the Rayburn House Office Building. Ms. Cummings listened to the tape, doing so in the bathroom in Representative McDermott's office.[44]

As noted above, on January 10, 1997, the *New York Times* published an article by Mr. Clymer about the tape and its contents, and the article included a reported transcript of at least part of the tape.[45] The article references an anonymous Congressional source for the tape, but Representative McDermott subsequently acknowledged that he was the source for the newspaper.[46] On the morning of January 10, 1997, after he "read the newspaper," Representative McDermott met, at Representative McDermott's request, with James Cole, the Special Counsel to the House Select Committee on Ethics. According to Representative McDermott, he "realized, from the way [the newspaper article] was written and from the placement in the paper, that it was going to be an issue of public controversy and I thought I ought to talk to a lawyer. And, as I saw it, the perfect person was Jim Cole, if he would talk to me, because he knew the case, he knew everything. And I wanted to talk to him and see what he would say. So I contacted him."[47] The record does not indicate that Mr. Cole actually rendered any legal advice to Representative McDermott when they met.[48]

On January 13, 1997, the Martins held a press conference stating that they had given a copy of the taped intercepted telephone conversation to Representative

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[44] *Id.* at 92; Rep. McDermott Response to SUF at ¶¶ 28, 29.

[45] *See* Exhibit 2.

[46] Rep. McDermott Dep. at 220-221.

[47] *Id.* at 307.

[48] *See id.* at 331.

McDermott.[49] On that same day, Representative McDermott transmitted his copy of the tape in its original envelope to Chairman Nancy Johnson of the House Select Committee on Ethics.[50] In response to this action, the Chief Counsel of the House Select Committee on Ethics transmitted a letter to Representative McDermott, dated January 13, 1997, that stated:

> This is to notify you that the material you sent to the Committee at 4:33 p.m. this afternoon was not accepted. By direction of the Chair and after consultation with the Chief Counsel of the Criminal Division of the Department of Justice, the contents of the envelope including the audio cassette tape and the cover letter

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[49] *2 Floridians Talk of How They Taped The Speaker, N.Y. Times* (Jan. 14, 1997) (Exhibit 5). *See also* Rep. McDermott Response to SUF at ¶ 40. According to the *New York Times* article, the Martins stated that they were responsible for intercepting Rep. Boehner's conversation, and they identified Rep. McDermott as the person to whom they delivered the tape:

> The middle-aged couple—he is a maintenance man at a school and she is a teacher's aide—are active in both the National Education Association and the Democratic Party in their home county of Columbia in northern Florida, so they have a keen interest in politics. Mr. Martin said they had used a small tape recorder to record the conversation, planning to play back the voice of the famous politician someday for their grandson, who is expected to be born in three weeks. But as they listened, they changed their mind. They took the tape to their Representative, Karen L. Thurman, a Democrat, and later, on her advice, took the tape to the Senior Democrat on the House Ethics Committee, Representative Jim McDermott. . . . Mrs. Martin said she and her husband had hand-delivered the tape to Mr. McDermott. "He took the envelope in his hand and said he would listen to it," she said.

[50] Rep. McDermott Dep. at 213

were hand delivered to the Department of Justice early this evening.[51]

Representative McDermott resigned from the House Select Committee on Ethics on January 13, 1997. Representative McDermott's answer to Representative Boehner's amended civil complaint states that "Congressman McDermott concluded that the political controversy over the Tape might impede the House Ethics Committee from completing its work if he continued to serve on it."[52] Representative McDermott further testified in his deposition that "I recognized that this was going to be a distraction and I wanted to get it out of the way."[53] Representative McDermott also testified that he does not remember if at the time he determined to resign from the House Select Committee on Ethics if he was aware that the Martins had publicly disclosed their giving of the tape to him.[54]

On or about January 14, 1997, Representative McDermott transmitted a letter to the Chairman of the House Select Committee on Ethics to communicate his objection to her forwarding of the copy of the taped intercepted telephone conversation to the Department of Justice. Representative McDermott's letter expressed his "considerable chagrin" at this course of action, and also his view that the Chairman's action violated House Rule X, cl. 4(e)(1)(C) of the Rules of the House for the 105th Congress.[55]

Representative McDermott testified during his deposition that based on the tape he received from the

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[51] *See* Exhibit 3.

[52] Rep. McDermott's Answer to Rep. Boehner's Amended Complaint at ¶ 26.

[53] Rep. McDermott Dep. at 137.

[54] *Id.* at 133.

[55] *See* Exhibit 6.

Martins, he understood that Representative Gingrich reached an agreement with the Gingrich Subcommittee that Representative Gingrich "was entitled to make a public statement, but [Representative Gingrich] apparently had agreed not to orchestrate any kind of response to undermine the statement or to undermine the work of the committee."[56] In Representative McDermott's view, based on the recorded telephone call, Representative Gingrich was "participating in orchestration and violating the agreement."[57] In his testimony, Representative McDermott indicated his view that the "public had a right to know" about the information contained on the tape.[58] He stated: "I came into politics during the Vietnam era . . . . And I knew about the Pentagon Papers. And there are some things the people are entitled to know, one of which is what the person who's third in line to be President of the United States, how he deals with issues."[59] He also indicated in his court filings that he believed that "the First Amendment entitled him to share the tape with the press as truthful information of public concern that he had lawfully obtained from another,"[60] and that "if a member of the House Ethics Committee received information from sources outside the Committee and outside the context of Committee proceedings, then he would have been free to disclose it under the House Ethics Committee Rules in effect in January, 1997."[61]

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[56] Rep. McDermott Dep. at 33.

[57] *Id.* at 45; Rep. McDermott Response to SUF at ¶ 76.

[58] Rep. McDermott Dep. at 61.

[59] *Id.*: *see also id.* at 271-72 ("My disclosure was done because I felt the people had a right to know about the behavior of a Public Official.")

[60] Rep. McDermott Response to SUF at ¶ 78.

[61] *Id.* at ¶ 79.

C. Representative Boehner's Lawsuit Against Representative McDermott

As referenced in the foregoing discussion, Representative McDermott's conduct in disclosing to the media the copy of the tape furnished to him by John and Alice Martin became the subject of a lawsuit filed in the United States District Court for the District of Columbia by Representative John A. Boehner. Representative Boehner, the plaintiff, initiated the lawsuit in a complaint he filed on March 9, 1998. Representative Boehner's complaint alleged that Representative McDermott, the defendant, knowingly disclosed an unlawfully intercepted communication in violation of the federal wiretapping statute, 18 U.S.C. § 2511(1)(c) and a Florida wiretapping statute, Fla. Stat. § 934.01(1)(c). 18 U.S.C. § 2511 provides, in pertinent part, that:

> (1) Except as otherwise specifically provided in this chapter any person who—
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> (c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;
>
> shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

Section 2520 permits "any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of" 18 U.S.C. § 2511 to initiate a civil suit to recover equitable and declaratory relieve and monetary damages. The cited Florida statute contains language substantially similar to that of 18 U.S.C. § 2511(1)(c).

The ongoing litigation is now proceeding on its second round of appellate level review, having once already been

addressed by United States Supreme Court and remanded back to the lower courts. The presiding United States District Judge in this matter is Chief Judge Thomas F. Hogan. In the early stages of the litigation, Judge Hogan granted a motion to dismiss the litigation filed by Representative McDermott, holding that the First Amendment protected disclosure of lawfully obtained information.[62] The United States Court of Appeals for the District of Columbia Circuit reversed Judge Hogan's decision and held that the federal wiretapping statute was not unconstitutional as applied to Representative McDermott.[63] The Supreme Court granted certiorari, vacated the judgment of the Court of Appeals, and remanded the case in light of the Supreme Court's decision in *Bartnicki v. Vopper*, 532 U.S. 514, 121 S. Ct. 1753, 149 L. Ed. 2d 787 (2001).[64] On remand from the Supreme Court, the Court of Appeals remanded the matter back to the United States District Court, concluding that it "would benefit from having the district court pass upon the arguments that have taken on new-found importance after *Bartnicki*."[65]

After the matter returned to the district court in 2001, the parties in the litigation engaged in discovery and filed cross-motions for summary judgment. On August 20, 2004, Judge Hogan held that Representative McDermott violated 18 U.S.C. § 2511(1)(c) when he disclosed the tape furnished to him by the Martins to members of the news media. *Boehner v. McDermott*, 332 F. Supp. 2d 149, 158

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[62] *See Boehner v. McDermott*, No. 98-594, 1998 WL 436897, at *7 (D.D.C. July 28, 1998), *rev'd*, 191 F.3d 463 (D.C. Cir. 1999)).

[63] *Boehner*, 191 F. 3d at 478.

[64] *See McDermott v. Boehner*, 532 U.S. 1050, 121 S. Ct. 2190, 149 L. Ed. 2d 1022 (2001).

[65] *Boehner v. McDermott*, 22 Fed. Appx. 16, 2001 WL 1699420 (D.C. Cir. 2001).

(D.D.C. 2004). In a subsequent order on October 22, 2004, Judge Hogan ordered that Representative McDermott pay Representative Boehner $10,000 in statutory damages, $50,000 in punitive damages, and reasonable attorneys fees and costs. In the same order, Judge Hogan held the matter of the amount of attorneys fees in abeyance pending resolutions of appeals in the litigation.

On March 28, 2006, a 2-1 decision by a three judge panel of the United States Court of Appeals for the District of Columbia upheld Judge Hogan's ruling in favor of Representative Boehner. The essential disagreement between the majority and the dissenting judge was whether the First Amendment of the Constitution protected Representative McDermott from prosecution for his disclosure of the taped telephone conversation he received from the Martins. *See Boehner v. McDermott*, 441 F.3d 1010, 1017 (D.C. Cir. 2006).

On June 23, 2006, Representative McDermott's petition for a rehearing en banc was granted by the United States Court of Appeals for the District of Columbia Circuit. The Court vacated the judgment of the three panel that was filed on March 28, 2006.[66] The case was reheard by the court sitting en banc on October 31, 2006, and no decision has yet been rendered.

D. Representative Hobson's Complaint and the Jurisdiction of the Investigative Subcommittee

As noted previously, on December 28, 2004, the Chairman and Ranking Minority Member of the Committee determined to forward portions of Representative Hobson's complaint to the Investigative Subcommittee. In a public statement on that same date, the Chairman and Ranking Minority Member of the Committee announced that "the subcommittee will

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[66] *See Boehner v. McDermott*, No. 04-7203 (D.C. Cir. Order filed June 23, 2006).

conduct an inquiry on allegations that Representative McDermott's conduct violated the House Code of Official Conduct (clause 1 of which provides that Members and staff shall conduct themselves "at all times in a manner which shall reflect creditably on the House of Representatives"), provisions of the Code of Ethics for Government Service, the committee member non-disclosure agreement, or the Committee confidentiality rules."[67] As noted below, the Investigative Subcommittee interpreted this announcement as limiting its inquiry to violations of House and Committee rules, and not requiring the Investigative Subcommittee to reach an independent judgment as to whether Representative McDermott violated a federal statute, *i.e.*, 18 U.S.C. § 2511, a question pending before the United States Court of Appeals for the District of Columbia Circuit. In other words, the Investigative Subcommittee's charge was to determine whether Representative McDermott's conduct, which might or might not support a finding of a violation of federal law, was a violation of House and Committee rules applicable to him as a Member of the House and as Ranking Minority Member of the House Select Committee on Ethics. The Investigative Subcommittee also addressed specifically the question of the applicability of House Rule 23, Clause 10 to Representative McDermott, because that was one of the matters in Representative Hobson's complaint that was referred to the Subcommittee.

E. Applicable Confidentiality Rules During the 104th Congress

During the 104th Congress (1995-1996) and during the temporary existence in January 1997 of the House Select Committee in the 105th Congress, two rules of the

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[67] *See* Exhibit 7 (Statement of Chairman Joel Hefley and Ranking Minority Member Alan B. Mollohan dated December 28, 2004).

Committee on Standards of Official Conduct—Rule 9 and Rule 10(b)—addressed the topic of confidentiality by Members and staff of the Committee.[68]

Rule 9 of the Rules of the Committee on Standards of Official Conduct provided:

> *Communications by Committee Members and Staff*
>
> Committee members and staff shall not disclose any evidence relating to an investigation to any person or organization outside the Committee unless authorized by the Committee, nor shall any evidence in the possession of an investigative subcommittee be disclosed to Committee members who are not members of the subcommittee prior to the filing of a Statement of Alleged Violation with the Committee.

Rule 10(b) of the Rules of the Committee on Standards of Official Conduct provided:

> *Committee Records*

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[68] As explained earlier in this Report, the relevant rules in effect during the 104th Congress are implicated in this matter even though the conduct under review occurred during the 105th Congress. *See* House Rule 10, Clause 4(e)(3) (105th Congress) (as adopted in H. Res. 5 on January 7, 1997) (The Select Committee on Ethics "shall possess the same authority as, and shall conduct its proceedings under the same rules, terms, and conditions . . . as those applicable to the standing Committee on Standards of Official Conduct in the One Hundred Fourth Congress[.]"). We further note that Committee Rules 9 and 10(b) for the 104th Congress appear to implement House Rule X, Clause 4(e)(2)(F) (104th Congress), which provided with regard to the Committee that "[n]o information or testimony received, or the contents of a complaint or the fact of its filing, shall be publicly disclosed by any committee or staff member unless specifically authorized in each instance by a vote of the full committee."

> Members and staff of the Committee shall not disclose to any person or organization outside the Committee, unless authorized by the Committee, any information regarding the Committee's or a Subcommittee's investigative, adjudicatory or other proceedings, including, but not limited to: (i) the fact of or nature of any complaints; (ii) executive session proceedings; (iii) information pertaining to or copies of any Committee or subcommittee report, study, or other document which purports to express the views, findings, conclusions, or recommendations of the Committee or subcommittee in connection with any of its activities or proceedings; or (iv) any other information or allegation respecting the conduct of a Member, officer, or employee.

Neither Committee nor House rules during the 104th Congress mandated the execution of a formal confidentiality oath by Members of the Committee. However, during the 104th Congress, the Committee determined to implement a policy under which its Members would sign a "Nondisclosure Agreement" containing the following text:

> The purpose of this Nondisclosure Agreement is to ensure the confidentiality of all information received or processed by the Committee on Standards of Official Conduct (the Committee).
>
> I do solemnly swear (or affirm) that I will not disclose any information received in the course of my service with the Committee in accordance with Committee Rule 10, except when authorized by the Committee or the House of Representatives.

Committee records do not contain a copy of any such agreement executed by Representative McDermott, although there are copies of the agreement signed by all

other Members of the Committee during the 104th Congress. The record does not indicate that the House Select Committee on Ethics, established in January 1997, implemented a requirement that Members of that body sign nondisclosure agreements, although arguably formal action implementing such a policy was not necessary due to the instructions of the House that the House Select Committee on Ethics "shall possess the same authority as, and shall conduct its proceedings under the same rules, terms, and conditions . . . as those applicable to the standing Committee on Standards of Official Conduct in the One Hundred Fourth Congress[.]"[69]

For the purpose of completeness, the Investigative Subcommittee notes that it was not until the adoption of H. Res. 168 (September 18, 1997) during the 105th Congress (1996-1997)—implementing the recommendations of the bipartisan House Ethics Reform Task Force—that a confidentiality oath requirement for Members of the Committee was added to House rules.

Specifically, the 1997 Report of the Ethics Reform Task Force stated that "[e]nsuring the confidentiality of Standards Committee deliberations and matters pending before the Committee is essential to protect the rights of individuals accused of misconduct, preserve the integrity of the investigative process, and cultivate collegiality among Committee members."[70] Towards this end, it was recommended that House rules require that Committee Members, "pool" Members, and Committee staff execute a confidentiality oath before they have access to information that is confidential under Committee rules.[71]

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[69] *See* House Rule 10, Clause 4(e)(3) (105th Congress) (as adopted in H. Res. 5 on January 7, 1997).

[70] *See* Report of the Ethics Reform Task Force on H. Res. 168, 105th Cong., 1st Sess., at 10-11 (June 17, 1997).

[71] *Id.*

The text of the proposed oath was as follows: " I do solemnly swear (or affirm) that I will not disclose, to any person or entity outside the Committee on Standards of Official Conduct, any information received in the course of my service with the committee, except as authorized by the Committee or in accordance with its rules." In accordance with the recommendations of the Task Force, breaches of confidentiality would be investigated by the Committee and a proven violation of the confidentiality oath by a Member or employee of the Committee would be a violation of House rules.[72] A formal oath requirement was added to the Committee's rules on September 30, 1997, and is currently codified as Committee Rule 7(a).

III. CONCLUSIONS AND RECOMMENDATIONS

A. Federal Statute Prohibiting Disclosure of Illegally Intercepted Electronic Communications (18 U.S.C. § 2511)

The Investigative Subcommittee reached no conclusion as to whether Representative McDermott violated 18 U.S.C. § 2511 in connection with his disclosure to the news media of the contents of a taped intercepted telephone conversation furnished to him by the Martins, as it was not the mandate of the Investigative Subcommittee to resolve this question. Rather, the focus of the Investigative Subcommittee's inquiry was whether, by the same conduct which may or may not establish a violation of law in the federal court proceedings between Representative McDermott and Representative Boehner, Representative McDermott also violated "the House Code of Official Conduct (Clause 1 of which provides that Members and staff shall conduct themselves "at all times

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[72] *Id.* The floor debate on H. Res. 168 also addressed the importance of improving the confidentiality of the Committee's work as means to "maintain the integrity of the process." 143 Cong. Rec. H7546 (daily ed. Sept. 18, 1997) (statement of Rep. Cardin).

in a manner which shall reflect creditably on the House of Representatives"), provisions of the Code of Ethics for Government Service, the committee member non-disclosure agreement, or the Committee confidentiality rules."[73] In any event, given the important and novel issues of First Amendment law involved in the *Boehner v. McDermott* litigation—as evidenced by the appellate and Supreme Court interest in the case—the Investigative Subcommittee concluded that the question of law should be left to the judicial branch.

B. Refraining from Legislative Activity (House Rule 23, Clause 10)

The Investigative Subcommittee concluded that there was no violation by Representative McDermott of House Rule 23, Clause 10. The findings of Judge Hogan on August 20, 2004 in the *Boehner v. McDermott* civil litigation do not implicate House Rule 23, Clause 10, which only applies where a Member of the House is "convicted by a court of record for the commission of a crime for which a sentence of two or more years' imprisonment may be imposed"; *i.e.*, upon a plea of guilty by a Member in a criminal proceeding, or upon a court finding of guilty by judge or jury in a criminal proceeding. Regardless of the outcome of *Boehner v. McDermott* after all the appeal options are exhausted, that case is a civil matter between two private parties and does not implicate House Rule 23, Clause 10. The fact that the same statute may also establish a basis for criminal prosecution—using different procedures and a far more stringent burden of proof—does not alter this conclusion. Many statutes, including the Federal Election Campaign Act, contain options for both criminal and civil enforcement;[74] however, there was never any intention by the House to apply House Rule 23, clause 10 and thereby restrain "the

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[73] *See* Exhibit 7.

[74] *See* 2 U.S.C. § 437g.

maximum freedom of Members to represent their constituencies" in any circumstances other than those involving conviction in a criminal proceeding.[75] Regarding a proposal that the House amend the Code of Official Conduct to include the prohibition now encompassed in House Rule 23, Clause 10, the Committee reported to the House that it "recognizes a very distinguishable link in the chain of due process—that is, the point at which the defendant no longer has claim to the presumption of innocence. This point is reached in a criminal prosecution upon a plea of guilty or upon conviction by a jury or by a judge (or judges) if jury trial is waived. *It is to this condition, and only to this condition, that the proposed resolution is directed.*"[76]

C. Committee Rules Related to Confidentiality of Committee Proceedings and to the Obligations of a Ranking Minority Member of the Committee

The Investigative Subcommittee reviewed the applicable Committee rules related to the confidentiality of Committee proceedings and concluded that Representative McDermott's conduct, *i.e.*, his disclosure to the news media of the contents of the tape furnished to him by the Martins, was inconsistent with the spirit of the applicable rules and represented a failure on his part to meet his obligations as Ranking Minority Member of the House Select Committee on Ethics.

As noted, Rule 9 of the Rules of the Committee on Standards of Official Conduct for the 104th Congress prohibited disclosure by a Member of "any evidence relating to an investigation to any person or organization

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[75] *House Committee on Standards of Official Conduct, Policy of the House of Representatives With Respect to Actions by Members Convicted of Certain Crimes*, H. Rep. 94-76, 94th Cong., 1st Sess. (1975) at 4.

[76] *Id.* at 2 (emphasis added).

outside the Committee unless authorized by the Committee," and further prohibited "evidence in the possession of an investigative subcommittee [from] be[ing] disclosed to Committee members who are not members of the subcommittee prior to the filing of a Statement of Alleged Violation with the Committee. In addition, Rule 10(b) of the Rules of the Committee on Standards of Official Conduct for the 104th Congress prohibited disclosure by a Member, "unless authorized by the Committee" of "any information regarding the Committee's or a subcommittee's investigative, adjudicatory or other proceedings, including, but not limited to: (i) the fact of or nature of any complaints; (ii) executive session proceedings; (iii) information pertaining to or copies of any Committee or subcommittee report, study, or other document which purports to express the views, findings, conclusions, or recommendations of the Committee or subcommittee in connection with any of its activities or proceedings; or (iv) any other information or allegation respecting the conduct of a Member, officer, or employee."

The aforementioned rules support the House ethics processes by protecting the integrity and confidentiality of Committee and Investigative Subcommittee proceedings and deliberations, and protecting the rights of individuals accused of misconduct and subject to ethics proceedings.

Indeed, the purpose of the Committee's rules is emphasized in the foreword to the Rules of the Committee on Standards of Official conduct for the 104th Congress, adopted by the Committee on February 9, 1995, which states:

> The Committee on Standards of Official Conduct is unique in the House of Representatives. Consistent with the duty to carry out its advisory and enforcement responsibilities in an impartial manner, the Committee is the only standing committee of the House of Representatives the membership

> of which is divided evenly by party. These rules are intended to provide a fair procedural framework for the conduct of the Committee's activities and to help insure that the Committee serves well the people of the United States, the House of Representatives, and the Members, officers, and employees of the House of Representatives.[77]

The forward reflects the unique charter of the Committee to conduct its work in a non-partisan manner, and the threat posed to the integrity of the House *of even the appearance of unfairness* to Members under investigation or of bias or impartiality by Members of the Committee in fulfilling their responsibilities.

By his conduct in January 1997, Representative McDermott failed to meet this standard. Representative McDermott's secretive disclosure to the news media as to the alleged conduct of Representative Gingrich risked undermining the ethics process regarding that Member. Representative McDermott's actions were not consistent with the spirit of the Committee's rules.[78] In reaching this conclusion, the Investigative Subcommittee did not give weight to Representative McDermott's stated excuse for his conduct: the public's entitlement to be informed.

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[77] The identical foreword is contained in the Rules of the Committee for the current Congress.

[78] *See* House Rule 23, clause 2, providing that "[a] Member . . . shall adhere to the spirit and the letter of the Rules of the House and to the rules of duly constituted committees thereof." House Rule 23, Clause 2, "has been interpreted to mean that *Members, officers, and employees may not do indirectly what they would be barred from doing directly,* House Ethics Manual at 15 (italics original), and that "a narrow technical reading of a House rule should not overcome its 'spirit' and the intent of the House in adopting that and other rules of conduct." *Id.* (citing Final Report of House Select Committee on Ethics, H. Rep. No. 95-1837, 95th Cong., 2d Sess. (1979) app. at 61).

This is not a justification for potentially undermining the House ethics process. In the normal course, Members entrusted to serve on the Committee have their first obligation to the integrity of the House ethics process, which itself supports public confidence in the institution of the House. A better course of action would have been for Representative McDermott to entrust the Committee *at the outset* with the information to which he alone on the Committee had access, and for that body, *collectively*, to make determinations, consistent with its rules, as it deemed appropriate.

The Investigative Subcommittee decided against further proceedings in this matter. The Investigative Subcommittee additionally recommends that the Report of the Investigative Subcommittee be released to the public with no further statement by the Committee beyond announcing release of this Report.

December 11, 2006

PRESS STATEMENT

IN THE MATTER OF REPRESENTATIVE JAMES MCDERMOTT

On December 8, 2006, the Committee on Standards of Official Conduct voted to adopt the attached *Report of the Investigative Subcommittee*, "In the Matter of Representative James McDermott," dated December 6, 2006, as the Report of the full Committee in this matter.